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OF THE SEVERAL STATES.

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By A. C. FREEMAN,
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AMERICAN STATE REPORTS.

VOL. LXXXVII.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

EGGLESTON v. STATE.

[129 Ala. 80, 30 South. 582.]

LARCENY.—ONE WHO, AT THE TIME HE RECEIVES MONEY, entertains the fraudulent purpose of appropriating it to his own use, is guilty of larceny. (p. 18.)

EMBEZZLEMENT.—ONE WHO, AFTER ACQUIRING THE POSSESSION OF MONEY AS AGENT, conceives the fraudulent intent of converting it to his own use, is guilty of embezzlement. (p. 18.)

AGENCY.—ONE WHO IS INTRUSTED WITH MONEY for the purpose of changing it or having it changed is an agent. (p. 18.)

EMBEZZLEMENT—QUESTION FOR JURY.—On a trial for embezzlement, it is for the jury to determine whether the defendant had the intent to fraudulently convert the money to his own use or to the use of another, or whether he fraudulently secreted it with the intent to convert it. (p. 18.)

EMBEZZLEMENT—DISPOSITION OF MONEY.—In a prosecution for embezzlement the state is not required to show what became of the money after it had been embezzled. (p. 18.)

EMBEZZLEMENT.—A CHARGE THAT THE DEFENDANT would not be guilty of embezzlement if he gave the money to another to change, and such other person kept it, is erroneous, since it omits reference to the secretion of the money. (p. 18.)

IN A CRIMINAL CASE A CHARGE THAT GOOD CHARACTER may of itself raise a reasonable doubt so as to authorize an acquittal, when no such doubt would arise in the absence of such testimony, is erroneous. (p. 18.)

Indictment on two counts, one for embezzlement and one for larceny. A purchaser gave the defendant a twenty dollar gold piece in payment, and the defendant not being able to change it, went elsewhere to secure change. There was evidence that

he secreted the twenty dollar piece about his person, and handed out one dollar when he went to get change, and opposing evidence for the defense that he gave the identical money received to another to be changed. Among the instructions asked for and refused were these: 1. "If, from all the evidence, you cannot say to a moral certainty what became of the twenty dollars (if there was any twenty dollars), then you would not be authorized to convict the defendant"; 2. "If the defendant in good faith put the money on the counter for change, and Wash Childress got and kept it and converted it, then the defendant would not be guilty. If there is a reasonable doubt from the evidence as to whether defendant converted it or not, you should acquit him"; 3. "I charge you, as a matter of law, that good character may of itself raise a reasonable doubt in the minds of the jury, and so produce a reasonable doubt so as to authorize an acquittal, when no such doubt would arise in the absence of such testimony."

James Jackson and A. W. Carmichael, for the appellants.

Charles G. Brown, attorney general, for the state.

83 TYSON, J. It is doubtless the law that if defendant, when he received the twenty dollar gold piece, entertained the fraudulent purpose of appropriating it to his own use, the taking would be felonious, and it would constitute a larceny: *Levy v. State*, 79 Ala. 259. But if, after acquiring the possession of the money as the agent of its owner for the purpose of changing it or having it changed, he conceived the fraudulent intent to convert it to his own use or to the use of another, or he fraudulently secreted it with intent to convert it to his own use or to the use of another, he was guilty of embezzlement: Code, sec. 4659.

The defendant was an agent, within the meaning of section 4659 of the code, of the owner of the money intrusted to him for the purpose of having it changed. It was an undertaking by him "to transact some business or to manage some affair for another, by the authority and on account of it." Besides, he was a bailee, with a special property in the money: *Pullam v. State*, 78 Ala. 34, 56 Am. Rep. 21; *Hinderer v. State*, 38 Ala. 415; *Crocheron* ⁸⁴ *v. State*, 86 Ala. 65, 11 Am. St. Rep. 18, 5 South. 87; *Butler v. State*, 91 Ala. 87, 9 South. 191.

Under the evidence it was a question for the jury to determine whether the defendant had the intent to fraudulently

convert the money to his own use or to the use of another, as well as was it their peculiar province to determine whether or not he fraudulently secreted it with the intent to convert it to his own use or to the use of another. The finding by them of the truth of either would justify a conviction if other essential facts were sufficiently shown to their satisfaction.

Charge 1 requested by defendant had a tendency to mislead the jury to the conclusion that the burden of proof was upon the state to show what became of the money after it had been embezzled by defendant. No such burden rests upon the prosecution. But few convictions could ever be had if the state was required to prove what an embezzler has done with the money or property converted by him, or where he had fraudulently secreted it with the intent to convert it. It is utterly immaterial what became of the money after a fraudulent conversion of it or a fraudulent secretion of it with intent to convert it.

It was misleading also in another aspect of the case. The jury, under the evidence, were authorized to find that what took place between defendant, Childress, and Cobb at the lunch stand was merely a piece of jugglery, resorted to and participated in by all of them for the purpose of fraudulently secreting the money with the intent to convert it.

Charge 2 pretermits all reference to a fraudulent secretion of the money, and for this reason, if for none other, was bad.

Charges 3 and 4 have been so frequently condemned by this court, we will refrain from further comment: *Crawford v. State*, 112 Ala. 1, 21 South. 214; *Goldsmith v. State*, 105 Ala. 8, 16 South. 933; *Scott v. State*, 105 Ala. 57, 53 Am. St. Rep. 100, 16 South. 925.

The remaining charges were properly refused.
Affirmed.

EMBEZZLEMENT.

- I. Scope of Note.
- II. Definition.
- III. Distinction Between Embezzlement and Larceny.
- IV. Property Which may be Embezzled.
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 - c. Ownership.
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V. Intent.

- a. Necessity for.
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- a. What Constitutes Generally.
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VIII. Who may Commit the Offense.

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- f. Administrators and Guardians.
- g. Assignees in Insolvency.
- h. Corporation Officers.
- i. Bank Officers.
- j. Public Officers.

I. Scope of Note.

It is not the purpose of this note to cover the entire subject of embezzlement, including indictment for the offense, the trial, the defenses which may be interposed, and the evidence admissible under the pleadings. We shall, however, fully discuss what the crime of embezzlement is, its essential elements, including a consideration of who may commit the offense, and, incidentally merely, the evidence which goes to show the existence of the essential elements of the offense.

Embezzlement being a statutory crime created for the purpose of providing for those cases which were not punishable as larceny at common law, it naturally results that the two crimes are closely allied, and it is frequently difficult to ascertain which offense has been committed. In view of this there are certain aspects of these

crimes which might be treated under either embezzlement or larceny, as for example the character of the possession of property at the time the offense is committed. For this reason it has been found more convenient to treat certain questions more fully under larceny than under embezzlement; hence where these subjects are not found to be fully discussed in this note, reference should be made to a note in volume 88 on "Larceny." We shall note where this occurs.

II. Definition.

Embezzlement is a statutory, and not a common-law, crime. For this reason no single definition can be given which is broad enough in its terms to cover the offense as it is known in the various states. This was clearly pointed out in *Ex parte Hedly*, 31 Cal. 109, where it was said that embezzlement was what the statute had made it to be, and reference must be had to the statute to ascertain the elements of the offense. In *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80, it was said to be the fraudulent appropriation of property by a person to whom it has been intrusted. In Texas, embezzlement is the conversion of money or other property of the principal or employer, and it must come into the possession of the agent or employé by virtue of his employment: *Brady v. State*, 21 Tex. App. 659, 1 S. W. 462. In *state v. Foster*, 1 Penne. (Del.) 289, 40 Atl. 939, the crime was defined as where one fraudulently appropriates the property of another intrusted to his care, or fraudulently misapplies it, instead of applying it to its proper purpose. These citations will merely serve to illustrate the nature of the offense, and it may be defined in general terms as the fraudulent appropriation of property by one who has rightful possession thereof. In minor particulars the crime differs in various states according to the terms of particular statutes. These differences will be noted when we consider the elements of the crime.

III. Distinction Between Embezzlement and Larceny.

Generally speaking, larceny and embezzlement are recognized as two distinct and separate crimes, proof of one not sustaining proof of the other. "Embezzlement, while nearly akin to larceny, and generally regarded as of that family, is nevertheless a separate and distinct offense," said the court in *Simco v. State*, 8 Tex. App. 406. And the authorities, generally, recognize the two crimes as distinct: See *Commonwealth v. Berry*, 99 Mass. 428, 96 Am. Dec. 767; *Commonwealth v. King*, 9 Cush. 284; *Fulton v. State*, 13 Ark. 168; *State v. Harmon*, 106 Mo. 635, 18 S. W. 128; *State v. Wingo*, 89 Ind. 204; *Johnson v. People*, 113 Ill. 99. In *Quinn v. People*, 123 Ill. 333, 15 N. E. 46, it was said that nothing which was made larceny at common law could be embezzlement under the Illinois

statute. And this distinction prevails though the statute reads that an embezzlement of property shall be larceny: *Commonwealth v. Stearns*, 2 Met. 343; *Commonwealth v. Simpson*, 9 Met. 138; *Fulton v. State*, 13 Ark. 168.

There are a few authorities which conflict with this view, however, and which seem to hold that the two crimes overlap, and indeed may be identical in some cases. Thus in *State v. Taberner*, 14 R. I. 272, 51 Am. Rep. 382, a conviction for embezzlement was sustained, though the offense was also deemed to be common-law larceny. And in *State v. Shirer*, 20 S. C. 392, where the statute made a breach of trust with fraudulent intent larceny, it was held that the act applied to cases which would have been larceny at common law as well as cases which the common law did not reach. The two offenses seem to be confused in *Norton v. State*, 4 Mo. 461, though under the present statute and decisions of Missouri the distinction between the two crimes is preserved: *State v. Harmon*, 106 Mo. 635, 18 S. W. 128.

The chief distinction between the two crimes lies in the character of acquiring possession of the property. In larceny there is a trespass, and this crime involves the idea of an unlawful acquisition of the property, while in embezzlement there is a fraudulent conversion of personal property after its possession has been lawfully acquired: See *Simco v. State*, 8 Tex. App. 406; *Commonwealth v. King*, 9 Cush. 284. Whether possession has been lawfully acquired, or whether there is possession at all, may frequently be a question of great nicety. This will be discussed in greater detail further on in this note, as well as in a note in volume 88 on "Larceny." The statutes defining embezzlement were intended to supplement the common law, and to provide for offenses which could not be reached under common-law larceny. "In the common-law definition of larceny," said the court in *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80, "there were two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps was caused by the rule that to sustain a charge of larceny it was necessary that the stolen goods should have been at some time in the prosecutor's possession. The second was in the assumption that when possession of goods was acquired by a bailee no subsequent fraudulent conversion constituted larceny while the bailment lasted, save in a few excepted cases. It was to meet these defects in the common law that statutes have been passed in most, if not in all, of the states of our Union, in some of which an offense is created known as embezzlement larceny, and in others, as in our own statute, designating the offense as embezzlement." The distinction between the two crimes, it is apparent, relates to some phase of the question of possession of the property stolen or fraudulently appropriated.

IV. Property Which may be Embezzled.

a. Character of Property.—Embezzlement being a statutory crime, a person can be convicted only upon proof of embezzlement of some of the specific property mentioned in the statute. Hence where the act provides only for the embezzlement of money, notes, checks, and other property of similar character, there can be no embezzlement of other assets or property not within the terms of the statute: *Thalheim v. State*, 38 Fla. 169, 20 South. 938. Under some statutes all classes of personal property may be embezzled: *State v. Small*, 26 Kan. 209. In *Bork v. People*, 91 N. Y. 5, under the general term "property" was held to be included negotiable bonds of a municipal corporation, complete in form, though unissued when received by the defendant as city treasurer. A similar conclusion was reached in *State v. White*, 66 Wis. 343, 28 N. W. 202. But in *State v. Stebbins*, 132 Mo. 332, 33 S. W. 1147, where the statute provided for the embezzlement of any evidence of debts "negotiable by delivery only," it was held that a conviction could not be had for the converting by a corporate officer to his own use, before issuance by the corporation, of a note of the corporation payable to his order. And the embezzlement of a promissory note was held not to be an offense within the meaning of an act which provided for "bank bills or notes": *State v. Stimson*, 24 N. J. L. 9. Generally, however, promissory notes and other evidences of debts are the subject of embezzlement: *State v. Orwig*, 24 Iowa, 102. As to other kinds of property which have been deemed the subject of embezzlement may be mentioned shares of corporate stock: *People v. Williams*, 60 Cal. 1; money drawn as a prize in a lottery: *State v. Cloutman*, 61 N. H. 143; railroad tickets: *Commonwealth v. Parker*, 165 Mass. 526, 43 N. E. 499; and liquors kept in violation of law: *Commonwealth v. Smith*, 129 Mass. 104. Under a statute defining embezzlement as the fraudulent conversion of property delivered to be carried for hire, it was held that wheat delivered for the purpose of storage could not be embezzled: *State v. Stoller*, 38 Iowa, 321. The statutes of a particular state must be examined to ascertain what property can be embezzled, as well as to determine the other elements of the crime.

b. Value.—The value of the property is not necessarily an essential element in the offense: *People v. Bork*, 31 Hun, 360. Thus, the embezzlement of a horse or other animal is in some states a felony, without regard to the value of the property: *People v. Salorse*, 62 Cal. 139; *Washington v. State*, 72 Ala. 272. And a statute providing for the punishment of any person who embezzles a railroad ticket, the question of its value is immaterial: *McDaniels v. People*, 118 Ill. 301, 8 N. E. 687. But an article embezzled must not be wholly without value: *Perry v. State*, 22 Tex. App. 19, 2 S. W. 600.

Where the offense is divided into degrees, or where it is a felony or misdemeanor according to the value of the property embezzled, value becomes an element in the offense and should be alleged and proved: *People v. Donald*, 48 Mich 491, 12 N. W. 669; *People v. Cohen*, 8 Cal. 42. And where the penalty inflicted is in proportion to the value of the property, value becomes an element which should be averred and proved: *Grant v. State*, 35 Fla. 581, 48 Am. St. Rep. 263, 17 South. 225. Where coin or money of the government is embezzled, it is not necessary to aver its value, because its value is established by law, of which the courts will take notice: *State v. Stimson*, 24 N. J. L. 9; *State v. Knox*, 17 Neb. 683, 24 N. W. 382. But it must be lawful, legal tender money of the government of the United States, otherwise the courts will not take judicial notice of its value: *Bork v. People*, 16 Hun, 476.

c. Ownership.

1. **Must be in Another.**—A person cannot commit the crime of embezzlement in respect to money or property which is legally and absolutely his own. And this is true though he may at the time be in debt and does not intend to pay his creditors: *Parli v. Reed*, 30 Kan. 534, 2 Pac. 635. And a government official, who attempts to assign his unearned salary, since such a contract is against public policy and void, may afterward collect such salary and appropriate to his own use without being guilty of embezzlement: *State v. Williamson*, 118 Mo. 146, 40 Am. St. Rep. 358, 23 S. W. 1054. So, also, a laborer who holds tickets for wages, which are not transferable, does not part with the legal and beneficial ownership by selling them, and if he subsequently collects them and converts the money to his own use, he does not commit embezzlement: *St. Clair v. State*, 100 Ala. 61, 14 South. 544. The failure of a borrower to return money is not embezzlement, since the property is his own: *Ranguth v. People*, 186 Ill. 93, 57 N. E. 832. Under the Ohio statute, however, it seems that the property embezzled need not be wholly the property of another. Hence, it has been held that the agent and cashier of an unincorporated banking association may embezzle the assets of the association, although he is himself a shareholder: *State v. Kusnick*, 45 Ohio St. 535, 4 Am. St. Rep. 564, 15 N. E. 481. The Ohio statute wholly omits the words "property of another" in defining the crime.

2. **Evidence of Ownership.**—A qualified ownership with the right to the possession and control is all that need be shown: *Leonard v. State*, 7 Tex. App. 417. It is sufficient to show that the property embezzled was the property of a corporation de facto: *People v. Carter*, 122 Mich. 668, 81 N. W. 924. A consignee has such an ownership in property consigned as will sustain a charge for the embezzlement of such property from him as the owner: *Waterman*

v. State, 116 Ind. 51, 18 N. E. 63. A thief is such an owner of money that it may be embezzled by one to whom he has intrusted it: *State v. Littschke*, 27 Or. 189, 40 Pac. 167. One who intrusts paper to another for collection on commission has such an interest in a draft received by the latter in payment as will support a prosecution for embezzlement, although he took the agent's receipt to "account for the proceeds when paid": *People v. Hanaw*, 107 Mich. 337, 65 N. W. 231. A valid mortgage executed for a valuable consideration is the property of the mortgagee. The mortgagor has no ownership in it; hence if he secures possession for the purpose of delivering to the mortgagee, and instead of so doing fraudulently converts it to his own use, he is guilty of embezzlement: *Commonwealth v. Concanon*, 5 Allen, 502. When there is a contract of sale and the vendee fails to pay the purchase price, the vendor is not such an owner of the property sold as will sustain a prosecution for embezzlement: *State v. Barton*, 125 N. C. 702, 34 S. E. 553. And where the transaction between parties is a sale of money for money, there is no embezzlement: *State v. Obuchon*, 159 Mo. 256, 60 S. W. 85. An agent who sells land belonging to his principal and receives money in part payment may be guilty of embezzlement by appropriating it to his own use with a criminal intent, since it was received as part of the purchase price and belongs to his principal, notwithstanding the money was paid without the principal's authority: *State v. Schilb*, 159 Mo. 130, 60 S. W. 82. But in order that an agent may be charged with embezzlement, the property must be that of his principal. Hence where a sewing-machine agent, by authority, receives horses in exchange for machines, which the principal refuses to take, the title to the horses is in the agent, and upon a sale the proceeds vest in him, so that a failure and refusal to pay them over to his principal is not embezzlement: *Webb v. State*, 8 Tex. App. 310. Where an employer authorizes his bookkeeper to sell the former's notes and to deposit the proceeds in the latter's private bank account, and to pay his employer from his bank account as his employer might demand, the bookkeeper is not guilty of embezzlement if he loses the money in stock transactions: *Young etc. Co. v. Glendinning*, 194 Pa. St. 550, 45 Atl. 364. Where a landlord and tenant are joint owners of a crop, with possession in the landlord, he is not guilty of embezzlement if he sells the crop and refuses to account to the tenant for his share: *State v. Keith*, 126 N. C. 1114, 36 S. E. 169.

3. Where Agent Entitled to Commissions.—The fact that an agent who collects money for his principal may be entitled to commissions for such collecting does not give him such an ownership in the money that he will not be guilty of embezzlement if he converts it to his own use: *Clark v. Commonwealth*, 97 Ky. 76, 29 S. W. 973; *Commonwealth v. Smith*, 129 Mass. 104; *People v.*

Hanaw, 107 Mich. 37, 65 N. W. 231. The right to receive commissions does not constitute joint ownership on the part of an agent with the principal in the proceeds of the article sold: *State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144; *Brandenstein v. Way*, 17 Wash. 293, 49 Pac. 511; *Territory v. Meyer* (Ariz.), 24 Pac. 183.

It must be clear, however, that there is not joint ownership, and there are cases holding that one who receives money, a portion of which belongs to himself, as a commission, and which he is entitled to retain as such, is not guilty of embezzlement, though he converts the whole to his own use: *Stone v. Commonwealth*, 20 Ky. Law Rep. 478, 46 S. W. 721. The cases which hold that the defendant is not guilty of embezzlement seem to turn upon the question whether the agent follows collecting as a business, in which case he becomes a joint owner in the funds collected, or whether he is simply acting as the mere agent or servant of his principal in making the collection, in which case he is not a joint owner: See *Commonwealth v. Libbey*, 11 Met. 64, 45 Am. Dec. 185; *Commonwealth v. Stearns*, 2 Met. 343; *Clark v. Commonwealth*, 97 Ky. 76, 29 S. W. 973; *State v. Kent*, 22 Minn. 41, 21 Am. Rep. 764. In *Stone v. Commonwealth*, 20 Ky. Law Rep. 478, 46 S. W. 721, where the defendant acted as a collection agent and was deemed to have a joint interest in the fund collected, and hence was not guilty of embezzlement, the court said that the case was different "if the whole fund collected belongs to the company, the agent getting his commission in the nature of a rebate out of the sum actually paid over." A rule occasionally quoted is this, that if the money comes into the servant's hands, and any act remains to be done before he has the right to take his share, wrongful conversion to his own use is embezzlement; but if, on the receipt of the money, he is entitled to his share of commissions on the claim collected, it is not embezzlement: 13 Cent. L. J. 464. The latter part of this rule was held not to be the rule in Texas: *Aldrich v. State*, 29 Tex. App. 394, 16 S. W. 251. In *State v. Covert*, 14 Wash. 652, 45 Pac. 304, a driver of a laundry wagon was under a contract which charged him instead of the patrons with all the work brought in, and he was allowed to retain out of his collections twenty-two per cent of the amount due for laundry work, and he was made personally liable for failure to collect from patrons. Under these circumstances, the relation of debtor and creditor was held to exist between the driver and the laundry company, so that he could not be prosecuted for embezzlement of the money collected.

V. Intent.

a. *Necessity for.*—There must be a fraudulent intent on the part of the accused to convert the property to his own use in

order to constitute the crime of embezzlement: *Robinson v. State*, 109 Ga. 564, 77 Am. St. Rep. 392, 35 S. E. 57; *Beaty v. State*, 82 Ind. 228; *State v. Schilb*, 159 Mo. 130, 60 S. W. 82; *People v. Galland*, 55 Mich. 628, 22 N. W. 81; *People v. Hurst*, 62 Mich. 276, 28 N. W. 838; *State v. Temple*, 63 N. J. L. 375, 43 Atl. 697. It is the specific criminal intent that makes the retention of property fraudulent, the mere retention without more being insufficient to establish the offense: *State v. Temple*, 63 N. J. L. 375, 43 Atl. 697. The defendant must have made an intentionally wrong disposal of the property, indicating a design to cheat and deceive the owner: *People v. Hurst*, 62 Mich. 276, 28 N. W. 838. Not mere concealment, but fraudulent concealment must exist: *Fleener v. State*, 58 Ark. 98, 23 S. W. 1.

A guilty, criminal intent is an essential element of the crime although the statute in defining the offense fails to so declare it: *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282; *State v. Eastman*, 60 Kan. 557, 57 Pac. 109. This last case points out that embezzlement is *malum in se*, and hence the criminal intent is essential though not expressly named, it being only in crimes which are bad merely because prohibited that the guilty intent is unnecessary. There are a few cases in which a fraudulent intent seems to be unnecessary. Thus where a bank officer knowingly overdraws his account for his own benefit, it is embezzlement as a misdemeanor, even in the absence of any intent to defraud, the court saying in such a case that the evil to be remedied by the statute was such officers knowingly overdrawing their accounts: *State v. Stimson*, 24 N. J. L. 478. In Minnesota the failure of a city treasurer to pay over public money due to negligence and mismanagement of his trust is embezzlement, though no actual or deliberate purpose to defraud the city is shown: *State v. Czikczek*, 38 Minn. 192, 36 N. W. 457. So under the statutes of Vermont, an insurance agent who appropriates to his own use money received by him as such agent is guilty of embezzlement, though he may have had no fraudulent and felonious intent to steal: *State v. Hopkins*, 56 Vt. 250.

b. **When Sufficiently Appears.**—It is sufficient evidence of a fraudulent intent to show that the act was forbidden by law and was intentionally done: *State v. Silva*, 130 Mo. 440, 32 S. W. 1007. An intent to embezzle may be inferred from a felonious or fraudulent conversion: *State v. Schilb*, 159 Mo. 130, 60 S. W. 82; *State v. Noland*, 111 Mo. 473, 19 S. W. 715. A fraudulent intent is sufficiently shown where it appears that the defendant, an express agent, secretly took the money, and did not confess to the taking until he was found out and charged with it: *Smith v. State*, 34 Tex. Cr. Rep. 265, 30 S. W. 236.

The mere failure to enter the receipt of money by an agent does not show a criminal intent, but if coupled with a false entry it may: *State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144. The mere detention of money by an agent does not in itself warrant the inference of a fraudulent intent to misapply it, since such detention might be from an honest claim of right and from a dishonest motive: *State v. Foster*, 1 Penne. (Del.) 289, 40 Atl. 939. And the retention under an honest claim of right will not usually be embezzlement: *State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144; *Beaty v. State*, 82 Ind. 228. An unexplained failure to pay over money does not raise a presumption of felonious appropriation sufficient to convict: *State v. O'Kean*, 35 La. Ann. 901. And while the mere failure to pay over money is not sufficient evidence of a fraudulent intent, it may be if coupled with concealment on the part of the accused: *Fleener v. State*, 58 Ark. 98, 23 S. W. 1. And see *State v. Ezzard*, 40 S. C. 312, 18 S. E. 1025. Even in the case of a public officer, it has been held that mere failure to pay over the amount with which such officer is chargeable is not of itself alone sufficient to establish a fraudulent appropriation: *Robinson v. State*, 109 Ga. 564, 77 Am. St. Rep. 392, 35 S. E. 57. Though in *United States v. Adams*, 2 Dak. 305, 9 N. W. 718, the unlawful expenditure of money by a public officer even in good faith was deemed to be embezzlement, the court saying that where the act or omission was of itself made to constitute the offense, knowingly and willfully doing the act, or omitting to perform the duty imposed, carried with it a conclusive inference of criminal intent, and no other evidence of such intent was necessary. A similar ruling was made under the Michigan statutes in *People v. Warren*, 122 Mich. 504, 80 Am. St. Rep. 582, 81 N. W. 360, at least so far as making the knowingly doing of the prohibited act *prima facie* evidence of the offense, and it was held that to constitute embezzlement in a public officer it was not necessary that the unlawful appropriation should be with an intent to forever exclude the rightful owner from use and possession, the court pointing out that most men who use public funds do not mean to permanently retain them.

If acts are fraudulently done, they are done with a criminal intent: *Spalding v. People*, 172 Ill. 40, 49 N. E. 993.

The wrongful use by an attorney of his client's money is not embezzlement, in the absence of a criminal intent to fraudulently appropriate: *State v. Smith*, 47 La. Ann. 432, 16 South. 938. A servant who gives away old tools of his master as a matter of charity is not criminally liable, since there is no criminal intent: *State v. Fritchler*, 54 Mo. 424. And there is no sufficient evidence of a felonious intent, where a servant rides his master's horse to a town twenty miles distant, where he ties it and leaves it, but does

not offer to sell or otherwise convert it: *Ximenez v. State* (Tex.), 54 S. W. 588.

c. Time When Must Appear.—The intent to feloniously appropriate money or property must exist at the time of the appropriation: *Beaty v. State*, 82 Ind. 228; *State v. Reilly*, 4 Mo. App. 392. But it is immaterial that the defendant, at the time of appropriating the money or property to his own use, intended to restore it to the owners before his appropriation of it became known: *Commonwealth v. Tuckerman*, 10 Gray, 173. And this intent to steal must be formed after the person has acquired possession of the property: *People v. Smith*, 23 Cal. 280; *State v. Stone*, 68 Mo. 101; *Johnson v. People*, 113 Ill. 99. Indeed, the time when this intent to steal is formed marks the distinction between larceny and embezzlement as it is generally recognized. If at the time the person receives the property he had the fraudulent intent to convert it to his own use and to deprive the owner of it, and did in fact obtain possession for that purpose, then the crime is larceny. But if the original taking was not felonious, and the intent to steal was not formed until after possession was obtained, the offense is embezzlement: *People v. Salorse*, 62 Cal. 139; *People v. Smith*, 23 Cal. 280; *Levy v. State*, 79 Ala. 259; *State v. Stone*, 68 Mo. 101; *State v. Williams*, 35 Mo. 229.

If one intrusted with property converts it by a sale with the purpose of fraudulently appropriating it, the offense is embezzlement. But if at the time of the sale no such intent existed, and he intended to turn over the proceeds to the owner, but later conceived the fraudulent purpose and converted the proceeds, there is no embezzlement of the property sold: *Leonard v. State*, 7 Tex. App. 417; *Cole v. State*, 16 Tex. App. 461; *Huggins v. State* (Tex.), 60 S. W. 52.

A collector of public revenues is guilty of embezzlement whether he forms the intention to convert the money to his own use at the time or after he makes the collection: *State v. Findley*, 101 Mo. 217, 14 S. W. 185. From the syllabus in *Davis v. State*, 54 Neb. 177, 74 N. W. 599, it would appear that a bailee might be guilty of embezzlement though he had the intent to fraudulently appropriate the property at the time he received it into his possession. The opinion does not seem to support this, neither does the case cited and relied upon, viz., *Ford v. State*, 46 Neb. 390, 64 N. W. 1082, although it may be that under the statute of that state, the intent may exist at the time the property is received and the crime still be embezzlement. A similar inference may be read into the opinion in *People v. Civile*, 44 Hun, 497. In Rhode Island it is held squarely that the intent to fraudulently appropriate money may be conceived before the agent gets possession of it: *State v. Tabener*, 14 R. I. 272, 51 Am. Rep. 382.

VI. Possession.

a. Lawful Possession.—The statutory crime of embezzlement was created to remedy defects in the common law of larceny. The two chief defects related to possession, no conviction for larceny being possible where the property taken had never been in the actual possession of the prosecutor, nor was it possible where the offender had lawfully acquired possession: *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80.

Every larceny at common law included a trespass; hence no one lawfully in the possession of property could commit larceny thereof: *Johnson v. People*, 113 Ill. 99. Theft involves the idea of an unlawful acquisition, while embezzlement is the fraudulent conversion of personal property after its possession has been lawfully acquired: *Simco v. State*, 8 Tex. App. 406. "The chief distinction between the two crimes," said the court in *People v. Belden*, 37 Cal. 51, "is that in embezzlement the guilty party has, and in larceny he has not, the possession of the property at the time of the commission of the offense." Hence if a wife as agent of a third person comes into the possession of property, no right of possession is thereby conferred upon her husband, and if he appropriates the property to his own use, the offense is larceny and not embezzlement: *Pullam v. State*, 78 Ala. 31, 56 Am. Rep. 21. The gist of the offense of larceny is the felonious taking of what is another's with the simultaneous intent in the taker of misappropriating it, while in embezzlement there is no felonious taking, but the wrongdoer acquires possession with the consent of the owner: *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282; *Spalding v. People*, 172 Ill. 40, 49 N. E. 993.

We have previously noted that the intent with which the possession of the property is acquired may determine whether the crime is larceny or embezzlement. If possession is obtained by means of fraud for the purpose of stealing it, then there is no lawful possession, the real consent of the owner is not given, and the trespass essential to the crime of larceny exists: See, in addition to cases before cited, *Johnson v. People*, 113 Ill. 99; *Commonwealth v. Simpson*, 9 Met. 138; *Fulton v. State*, 13 Ark. 168. In this last case it was expressly said that the intention with which the defendant obtained possession of the property, was the turning point in the case. And while this is the rule prevailing generally, there are a few authorities to the contrary. Thus, in *Golden v. State*, 22 Tex. App. 1, 2 S. W. 531, the court, while admitting the distinction between the two crimes, says that though possession may have been fraudulently obtained, yet from the owner's point of view, the property may have been intrusted to the defendant so that his fraudulent appropriation of it would be embezzlement. In this

case, money was turned over to the defendant for deposit in a bank. The owner "intrusted it to him for that and no other purpose," said the court. "At the very time he obtained it, it is true that to all intents and purposes he was a thief, intending to steal it; but in so far as she was concerned, she was only creating him her agent to take the money for deposit for her to the bank. . . . Instead of complying with the purposes of the trust and his agency, he misapplied, misappropriated, embezzled, and converted to his own use the money so confided to him. The evidence makes a most clear and indubitable case of embezzlement, even though it may contain all the essential elements of theft also." It must be confessed that there is considerable sound sense in such a view, and that from the owner's and bailor's point of view, the crime of embezzlement may be complete, although this view has not prevailed generally in this country. It was pointed out in *State v. Taberner*, 14 R. I. 272, 51 Am. Rep. 382, that the result of the discussion as to the nature of possession and the character of acquiring it "was to introduce into this branch of the criminal law a degree of intricacy and confusion which caused frequent failures of justice." After quoting the statute to show the class of agents who could commit embezzlement, the court continued: "The obvious meaning is that any agent who has money in his possession, which has come into his possession by virtue of his agency, is punishable under the statute if he embezzles or fraudulently converts it. We do not see how the fact that he gets the money by fraud, or that before he gets it he has conceived the purpose of appropriating it, can take the case out of the statute, if the money so received can be held to have come into his possession by virtue of his agency."

Possession may also become illegal, after being lawful in its origin, and in such case the offense is larceny and not embezzlement. Thus, if a servant or bailee is given a package to carry away for a purpose, and he breaks the package and appropriates the contents, the contract of bailment is said to be terminated, and his possession becomes unlawful so that the crime is larceny, and not embezzlement: *State v. Fairclough*, 29 Conn. 47, 76 Am. Dec. 590; *Johnson v. People*, 113 Ill. 99. The breaking of the package constitutes the trespass which distinguishes the two crimes: *Nichols v. People*, 17 N. Y. 114.

b. Distinction Between Possession and Custody.

1. **Generally.**—Most of the cases draw a clear distinction between the possession of property and its custody as bearing on the question whether the crime is larceny or embezzlement. In every larceny there must be a trespass, and trespass is an injury to the possession only. But there may be an apparent possession which amounts to custody only, the real possession being in the owner.

And where such custody exists, an appropriation of the property amounts to a trespass, and is larceny and not embezzlement. It was deemed almost a maxim of the common law that where one had the bare charge or custody of the goods of another, the legal possession remained in the owner, and the person might be guilty of trespass and larceny in fraudulently converting them to his own use: *Brown v. People*, 20 Colo. 161, 36 Pac. 1040; *People v. Perini*, 94 Cal. 573, 29 Pac. 1027; *Commonwealth v. James*, 1 Pick. 375; *Johnson v. People*, 113 Ill. 99; *Commonwealth v. O'Malley*, 97 Mass. 584.

A guest at a hotel or private house has the mere custody of the personal property he uses, so that if he appropriates it, it is larceny: *Johnson v. People*, 113 Ill. 99. So, where a purchaser of goods hands to the seller a bill of money exceeding the purchase price, intending that the seller return the change, the appropriation by the seller of the entire amount to his own use is larceny: *Finkelstein v. State*, 105 Ga. 617, 31 S. E. 589. And where one hands to another a sum of money to take a part out and return the balance, the owner only parts with the custody, and if any offense is committed, it is larceny: *Commonwealth v. O'Malley*, 97 Mass. 584. This case was followed in *People v. Johnson*, 91 Cal. 265, 27 Pac. 663, where money was handed to a lottery agent who proposed to explain how the drawings were made, and who refused to return the money after making the illustration. Having parted merely with the custody of the money, it was held that the defendant could not be convicted of embezzlement. The concurring opinions, however, criticise this Massachusetts case, Chief Justice Beatty saying that "such fine-spun distinctions serve but one purpose. They do not tend in the slightest degree to shield the innocent, but only to furnish an additional loop-hole of escape for the guilty." In the principal case the giving of money to another to get changed was held to be embezzlement. There is probably a tendency in some of the more recent cases not to allow these technical distinctions to defeat the ends of justice. Nevertheless, the distinction between custody and possession is very thoroughly imbedded in the law generally. In *Fulcher v. State*, 32 Tex. Cr. Rep. 621, 25 S. W. 625, a check was overpaid by mistake, the payee appropriating the money to his own use, and it was held that there was no bailment of the excess of the amount named in the check, the defendant merely having the custody of the money. Several cases in which a person merely has the custody of property are mentioned in *Johnson v. People*, 113 Ill. 99, the syllabus reading thus: "At the common law there are three cases in which a conviction for larceny may be sustained when the apparent possession is in the accused: 1. Where the accused has the mere custody of the property, as contradistinguished from possession, as in the case of servants and the like; 2. Where he obtains the custody and apparent possession by means

of fraud, or with the present purpose to steal the property; and 3. Where one having acquired possession by a valid contract of bailment, which is afterward terminated by some tortious act of the bailee, or otherwise, whereby the possession reverts to the owner, leaving the custody, merely, with the former, and he feloniously converts the property to his own use."

2. **In Case of Servants.**—A servant or agent occupies a different position with reference to his master's property from that of other bailees, for the possession of the agent or servant is the possession of the master or owner, and if the property is converted it is larceny, although there was no felonious intent when he received the property into his custody, because the property being in the possession of the owner, the trespass necessary to constitute larceny is committed: *Phelps v. People*, 72 N. Y. 334; *State v. Schingen*, 20 Wis. 74. The servant has the mere custody of his master's goods, and his possession is that of the master. Hence if he appropriates them to his own use with intent to steal, it is larceny. The necessary trespass occurs where he changes his custody of his master's goods into an adverse possession in himself with a felonious intent: *Powell v. State*, 34 Ark. 693; *Brown v. People*, 20 Colo. 161, 36 Pac. 1040. It has therefore been held that a warehouse foreman, who has authority to deliver property stored therein upon proper orders, but who has no authority to sell, commits larceny if he sells the property: *People v. Perini*, 94 Cal. 573, 29 Pac. 1027. A clerk of a store, who is under the direction and supervision of the owner, has the mere custody of the goods therein, so that a felonious appropriation is larceny and not embezzlement: *Zysman v. State (Tex.)*, 60 S. W. 669. Where one is left with the key to a storehouse, temporarily, for the purpose of taking care of the storehouse, he has merely the custody of the goods therein, and if he appropriates them with felonious intent the crime is larceny: *Rolder v. State*, 39 Tex. Cr. Rep. 199, 45 S. W. 570; *Wall v. State*, 75 Ga. 474. The mere physical possession or access to property is wholly insufficient to render one guilty of embezzlement. Hence a farm hand who takes wheat from a granary and sells it is guilty of larceny: *Colip v. State*, 153 Ind. 584, 74 Am. St. Rep. 322, 55 N. E. 739. So the taking of money from the master's drawer is larceny: *Commonwealth v. Ryan*, 155 Mass. 523, 31 Am. St. Rep. 560, 30 N. E. 364. But under the statute of South Carolina, the taking of the master's money by a clerk was deemed within the statute defining embezzlement, though it may have also been larceny at common law: *State v. Shirer*, 20 S. C. 392. And in *State v. Wingo*, 89 Ind. 204, it was said that in the absence of the Indiana statute defining embezzlement, the offense of the servant would have been larceny, since the possession of the servant was deemed the possession of the master. A practically similar holding is to be found in *Ennis v. State*, 3 Iowa, 67, where a team of horses and a wagon were in-

trusted to a servant by his master. Under some of the statutes which name the crime larceny after trust, there would appear to be a tendency to hold a servant or agent guilty of embezzlement who appropriates property of his principal intrusted to him for his principal's benefit: *Mobley v. State*, 114 Ga. 544, 40 S. E. 728. In this case money was given to a servant for the purpose of getting change, and the offense was deemed to be embezzlement under the statute and not larceny, the court drawing a distinction between giving money to a stranger for the purpose of changing it which would be larceny, the stranger having the custody merely, and giving money to a servant who occupies a fiduciary relation toward his master. The whole matter turns largely on the statutory definition of the offense. It will be seen later that in some states any conversion of property in the possession of a servant would sustain a conviction for embezzlement merely because of the trust relation, the distinctions relating to custody and possession having no bearing on the question.

In many of the states the character of a servant's possession is considered different according to whether it is acquired directly from the master or from a third person to deliver to the master. The matter will be found elaborately discussed in *Commonwealth v. Ryan*, 155 Mass. 523, 31 Am. St. Rep. 560, 30 N. E. 364, where it was held that for a servant to convert property delivered to him by a third person for his master was not larceny, provided he does so before the goods have reached their destination, or provided nothing more has happened to reduce him to a mere custodian; while, on the other hand, if the property is delivered to the servant by his master, he obtains merely the custody of the goods, and a conversion of them would be larceny. In this case a servant received money from the sale of his master's goods, and dropped it into a money drawer of a cash register, having an intent to appropriate it, slipping it into the drawer merely for his own convenience, and it was held that subsequently taking it from the drawer for his own use was embezzlement. So a servant who obtains money at a bank, on a check drawn by his master, is guilty of embezzlement if he appropriates it: *Commonwealth v. King*, 9 Cush. 284. Goods to be the subject of larceny must be in the actual or legal possession of the master before passing into the custody of the servant; and if they are delivered by a third person to the servant for the master and converted by the servant before they reach their ultimate destination, the servant has the possession and not the custody of the goods, and the offense is, therefore, embezzlement and not larceny: *Cody v. State*, 31 Tex. Cr. Rep. 183, 20 S. W. 398; *Warmoth v. Commonwealth*, 81 Ky. 133.

A servant who takes an article, delivered to him by his master, from one room to another, and converts it, is guilty of larceny, since he has the mere custody of the article: *United States v.*

Clew, 4 Wash. C. C. 700, Fed. Cas. No. 14,819. And a servant who has the custody of goods from his master to use in connection with his master's business, is guilty of larceny if he converts them to his own use: *Commonwealth v. Berry*, 99 Mass. 428, 96 Am. Dec. 767. A clerk and packer who enters his master's store and feloniously takes goods for his own use commits larceny, and not embezzlement: *Commonwealth v. Davis*, 104 Mass. 548.

c. Character in Which Property is Held.

1. By Virtue of Employment.

A. Servants and Agents.—The statutes defining embezzlement were mainly and generally intended to reach the cases of servants, agents, and others occupying fiduciary relations, whose conversion of property would not be larceny because their possession of it would be lawful. Hence, embezzlement is frequently defined as the converting or misapplying, by a clerk, agent, or servant or other person mentioned in the statute, without the consent of his principal or master of any money or other property which shall come into his possession by virtue of his employment. Under such statutes, therefore, the property embezzled must come into the employee's possession by virtue of his employment: *State v. Johnson*, 49 Iowa, 141; *Ex parte Hadley*, 31 Cal. 108; *People v. Sherman*, 10 Wend. 298, 25 Am. Dec. 563; *Lowenthal v. State*, 32 Ala. 589; *State v. Jennings*, 98 Mo. 493, 11 S. W. 980; *Ex parte Ricord*, 11 Nev. 287; *Johnson v. Commonwealth*, 5 Bush. 430.

If an agent obtains the money of his principal in the capacity of agent, although in an unauthorized manner, it is embezzlement for him to convert it to his own use: *Ex parte Hadley*, 31 Cal. 108; *People v. Gallagher*, 100 Cal. 466, 35 Pac. 80. Even an agent who has been dismissed from his employment may be guilty of embezzling property of which he obtains possession by virtue of his supposed employment a few days after dismissal: *State v. Jennings*, 98 Mo. 493, 11 S. W. 980. A clerk who is intrusted with bills to collect receives the money paid on them by virtue of his employment: *Ex parte Ricord*, 11 Nev. 287. A keeper of a county poorhouse may embezzle the property and supplies which come into his possession by virtue of his employment: *Coats v. People*, 4 Park. C. C. 662. Money embezzled need not be intrusted to an agent by his employer if he gets possession of it by virtue of his agency, as in the case of an express agent: *Commonwealth v. Clifford*, 96 Ky. 4, 27 S. W. 811.

Under the statutes relating to embezzlement by an agent or other like person of property which he receives by virtue of his employment, it seems that the distinction as to custody and possession may have no place, the main inquiry being whether the property came to his possession by virtue of his employment, and if it did,

a fraudulent appropriation of it is embezzlement, notwithstanding the rule that the possession of a servant is that of his master. Thus, in Indiana, embezzlement relates to cases where the property is in the control or possession of the wrongdoer by virtue of his employment, while to constitute larceny the property must be in the actual possession of the owner or have been wrongfully obtained from him by fraud: *Wynegar v. State*, 157 Ind. 577, 62 N. E. 38. So the Kentucky statute makes guilty of embezzlement any who convert property intrusted to them, or placed in their hands for the purpose of being carried or delivered: *Johnson v. Commonwealth*, 5 Bush, 430. And it would seem that if an agent obtains possession by virtue of his employment the crime would be embezzlement, and not common-law larceny, though his possession was fraudulently obtained: See *Golden v. State*, 22 Tex. App. 1, 2 S. W. 531. Even if the crime might have been larceny at common law, by reason of the fact that the agent had merely the custody of the property and not its possession, or by reason of the fact that the possession was fraudulently obtained, this would not prevent the person from being convicted of the statutory offense: *Lowenthal v. State*, 32 Ala. 589; *State v. Taberner*, 14 R. I. 272, 51 Am. Rep. 382.

To constitute embezzlement by an employé of a corporation, the property must come into his possession by virtue of his employment: *McAleer v. State*, 46 Neb. 116, 64 N. W. 358. A treasurer of a railroad is an officer of an incorporated company: *Commonwealth v. Tuckerman*, 10 Gray, 173. But the money which he embezzles must come under his care or into his possession by virtue of his office: *Bartow v. People*, 78 N. Y. 377. A bank president has such possession of the funds of the bank that he can embezzle them, although his possession and control is not exclusive of other officers: *Reeves v. State*, 95 Ala. 31, 11 South. 158. If the position of a bank officer gives him a superior or a joint and concurrent possession, custody, or control of the bank funds, with subordinate officers or agents of the bank, it constitutes such possession as will render the appropriation of funds to his own use embezzlement: *State v. Kortgaard*, 62 Minn. 7, 64 N. W. 51.

If the agent or employé has not authority to receive money or property, he does not come into its possession by virtue of his employment, and is, therefore, not guilty of embezzlement, although the party who gave him the money or property supposed him to be authorized to receive it: *State v. Johnson*, 49 Iowa, 141; *Brady v. State*, 21 Tex. App. 659, 1 S. W. 462. So a loan agent who obtained a loan for the prosecuting witness, the money to be paid to the latter when he had executed a mortgage, is not guilty of embezzlement of his principal's money when he appropriates it before the mortgage is given, for until then the money belongs to the lender and is not held by him as his principal's money by virtue of his agency: *State v. Cooper*, 102 Iowa, 146, 71 N. W. 197. And a lessor

of land who takes the crop raised by his lessee and refuses to account to him for it is not an agent or servant within the meaning of the statute, and does not hold the property by reason of any such relationship: *State v. Keith*, 126 N. C. 1114, 36 S. E. 169.

B. Public Officers.—Public officers occupy the same kind of a position as other agents under these statutes, and the money or property in their possession must be received by virtue of their office or the offense is not embezzlement. Thus, unissued municipal bonds in the custody of a city comptroller are held by him by virtue of his office, so that he can embezzle them, though the city might not be liable thereon; *State v. White*, 66 Wis. 343, 28 N. W. 202. And a city clerk who is allowed by continued usage to receive city moneys holds them by virtue of his office, and may be convicted of embezzlement for converting them to his own use: *State v. Spaulding*, 24 Kan. 1. Money collected as wharfage and tolls by the clerk of the board of state harbor commissioners belongs to the state as soon as collected, and before payment into the state treasury, and may be embezzled by such officer: *People v. Gray*, 66 Cal. 271, 5 Pac. 240. A deputy collector of customs who receives customs duties may be convicted of embezzling money received by virtue of his office: *United States v. Bowerman*, Fed. Cas. No. 14,630.

An officer having no right to the possession of public money cannot be convicted of embezzling money received under color of his office, though he falsely represented that he was entitled to it by virtue of his office: *State v. Bolin*, 110 Mo. 209, 19 S. W. 650. The act of Congress which made it a crime for any person employed in the United States mint to embezzle any of the metals used in coining was held not to apply to a clerk or servant employed in the mint, who had nothing to do with the metals used in coinage: *Commonwealth v. Hutchinson*, 2 Pars. Cas. 384.

2. In Trust Capacity.—As already noted, embezzlement statutes were adopted mainly for the purpose of reaching cases of violation of trust relationship. The cases of servants, agents, public officers, and others of a like character all involve the fraudulent appropriation of money or property by those who occupy a fiduciary relation. Embezzlement embraces those relations only which are enumerated in the statute defining the offense: *State v. Keith*, 126 N. C. 1114, 36 S. E. 169. The relations provided for may all be said to be of a fiduciary character, and the property must come into the possession of the wrongdoer by virtue of this fiduciary relation: See *Griffin v. State*, 4 Tex. App. 390. The cases cited under "Servants" and "Public Officers" illustrate but one phase, although the chief phase, of this trust capacity in which property is held and embezzled.

3. Relation of Debtor and Creditor.—When the dealings between two parties create a relation of debtor and creditor between them,

and not one of the trust relations enumerated in the statute, the money is not held by virtue of a trust relationship, and the offense of embezzlement is not committed by a failure to pay it over: *Mulford v. People*, 139 Ill. 586, 28 N. E. 1096. Thus, a laundry agent who is paid by commissions, and who is charged with the entire amount of laundry work done, stands in the relation of debtor to the laundry company, holds the money collected in that capacity, and cannot be convicted of embezzlement: *State v. Covert*, 14 Wash. 652, 45 Pac. 304. Similarly, a contract for the sale of money creates a relation of debtor and creditor, and not one of trust, so that a failure to pay over the money will not constitute embezzlement: *State v. Obuchon*, 159 Mo. 256, 60 S. W. 85.

VII. Conversion.

a. **What Constitutes, Generally.**—There must be a fraudulent conversion of the property to the defendant's use with the intent to steal it, in order to constitute embezzlement: *Penny v. State*, 88 Ala. 105, 7 South. 50; *Ex parte Hedley*, 31 Cal. 108; *People v. Wyman*, 102 Cal. 552, 36 Pac. 932; *State v. Snell*, 9 R. I. 112; *McAleer v. State*, 46 Neb. 116, 64 N. W. 358; *Commonwealth v. Este*, 140 Mass. 279, 2 N. E. 769.

An agent who takes a receipt for cotton and marks it with his son's name, but afterward delivers it with other receipts to the owner, may show an intent to appropriate the cotton, but in the absence of an actual appropriation, the crime of embezzlement is not committed: *Penny v. State*, 88 Ala. 105, 7 South. 50. The mere secreting with the intent to convert does not show actual embezzlement, but the owner must be deprived of his property by an actual adverse use or holding: *McAleer v. State*, 46 Neb. 116, 64 N. W. 358; *State v. Hill*, 47 Neb. 456, 66 N. W. 541. In *Baker v. State*, 6 Tex. App. 344, it was said there must be both a disposition and a fraudulent appropriation of the property in order to constitute the crime. Where a client sends money to his attorney to pay for government land, the money is not embezzled, if the time for payment has not expired and no demand has been made by the client for his money: *People v. Wyman*, 102 Cal. 552, 36 Pac. 932. Embezzlement is said to retain so much of the character of larceny that it is essential that the owner should be deprived of the property embezzled by an adverse holding or use. False entries are merely a step in embezzlement; the owner must be deprived of his property to constitute the crime: *Commonwealth v. Este*, 140 Mass. 279, 2 N. E. 769. To support a conviction for the embezzlement of property belonging to joint owners, the state must prove the nonconsent of all owners: *Cohen v. State*, 20 Tex. App. 224.

The sale of property as his own, with the fraudulent intent to appropriate the proceeds to his own use, is an embezzlement of the property: *Epperson v. State*, 22 Tex. App. 694, 3 S. W. 786. Where

an express agent is charged with the embezzlement of certain moneys, the fact that the money received was still in the safe is no defense, where he was short in his accounts with the company in an amount larger than that alleged to have been embezzled: *State v. Trolson*, 21 Nev. 419, 32 Pac. 930. It is immaterial that the actual money converted was not the identical coin or bills which the defendant received: *Commonwealth v. Mead*, 160 Mass. 319, 35 N. E. 1125. An unauthorized assignment and delivery of a mortgage, the property of a savings bank, by its treasurer, for his own use and benefit, is an embezzlement of the mortgage, although the treasurer believed that he had authority to assign the mortgage for the benefit of the bank, and although his act did not pass the title of the bank: *Commonwealth v. Pratt*, 137 Mass. 98. In this case it was the mortgages as written papers that the defendant was charged with embezzling, and the fact that the title of the bank did not pass was no defense. Where an agent, authorized to sell grain and to remit the proceeds to his principal, makes a sale, receives the money, fails to account, and appropriates the money to his own use, he is properly convicted of embezzlement: *State v. Hasledahl*, 3 N. Dak. 36, 53 N. W. 430. But an agent who is given money to invest in stocks, and does so invest, cannot be convicted of the embezzlement of such money upon proof of a fraudulent conversion of the stock: *People v. Leipsic*, 130 Cal. xviii, 62 Pac. 311. The mere failure to account for money which is left in the hands of a person, the owner relying upon his honesty to return it, is not embezzlement: *Kribs v. People*, 82 Ill. 425. But the same case holds that if money is placed in another's hands to be loaned for the owner for a specified time, upon certain security, at a stipulated rate of interest, and the person so intrusted with the money fraudulently converts it to his own use, it is embezzlement. The failure of an express agent to account for money will raise a presumption of conversion by him: *Riley v. State*, 32 Tex. 763. The using by a clerk of money of his employer to replace other sums previously appropriated by him to his own use, and reporting such money as unpaid, constitutes embezzlement: *Bouman v. Brown*, 52 Iowa, 437, 3 N. W. 609.

b. Mere Nonpayment of Money.—The mere nonpayment of money is not sufficient to convict one of the crime of embezzlement: *State v. Butler*, 21 S. C. 353. So a mere failure of an agent to return money intrusted to him, without other evidence of fraudulent conversion, is insufficient to show embezzlement: *Henderson v. State*, 129 Ala. 104, 29 South. 799. This is true, also, of the failure of a guardian to pay over to his ward money which has come into his hands: *State v. Henry*, 1 Lea, 720. Evidence merely of neglect to pay over money is not sufficient proof of a fraudulent conversion by the defendant to his own use: *Fitzgerald v. State*, 50 N. J. L. 475, 14 Atl. 746. The fact that upon balancing the account

of an agent with his principal he is found to be indebted to him is not alone sufficient to show embezzlement or converting to his own use: *Hamilton v. State*, 46 Neb. 284, 64 N. W. 965.

The failure of an agent to pay over the money of his principal is not embezzlement unless the necessary criminal intent exists, the design to wrong, cheat, or defraud the owner: *People v. Bauman*, 105 Mich. 543, 63 N. W. 516; *Home Lumber Co. v. Hartman*, 45 Mo. App. 647. But in Vermont the mere failure of an insurance agent for thirty days to pay over money which comes into his possession is made embezzlement by statute, even in the absence of a fraudulent intent to steal: *State v. Hopkins*, 56 Vt. 250.

In *State v. Collins*, 1 Marv. (Del.) 536, 41 Atl. 144, it was held that the retention of a principal's money by an agent under a claim of right, where the principal is indebted to the agent, was not embezzlement. The open and avowed appropriation under a claim of title preferred in good faith is a sufficient defense, even though the claim proves to be untenable: *People v. Lapique*, 120 Cal. 25, 52 Pac. 40. The claim, however, must be honest and consistent with the theory of innocence. An agent cannot fraudulently appropriate money, and subsequently set up a claim thereto of which he was ignorant at the time of the appropriation: *State v. Foster*, 1 Penne. (Del.) 289, 40 Atl. 939. But an agent cannot retain money collected for his principal as an offset against previous deductions from his salary, where there was no understanding between the parties authorizing such a course: *People v. Solomon*, 12 App. Div. 627, 42 N. Y. Supp. 573.

c. Refusal to Pay Money or Surrender Property.—The mere refusal of an agent to pay over money upon the demand of his principal seems not to be such a conversion as will amount to embezzlement per se: *Burnett v. State*, 60 N. J. L. 255, 37 Atl. 622. And the qualified refusal of the financial secretary of a corporation to surrender the corporate books until they should be revised in his presence and he be relieved of further responsibility, is not such a fraudulent conversion as will constitute embezzlement: *State v. Hellwig*, 60 Mo. App. 483. The mere inability of a bailee with whom flax has been stored to turn over the property to his bailor upon demand is not sufficient to show a fraudulent conversion to the bailee's own use: *State v. Cowdery*, 79 Minn. 94, 81 N. W. 750.

d. Necessity of Demand.—Under some statutory definitions of embezzlement, it is necessary that the owner of the property should make a demand for its return. Thus, in Kansas, the crime is defined as the neglect or refusal of an agent to deliver to his employer, upon demand, money or property which has come into his possession by virtue of his employment: *State v. Hayes*, 59 Kan. 61, 51 Pac. 905. The gist of the offense there is the refusal to deliver upon demand: *State v. Pierce*, 7 Kan. App. 418, 53 Pac. 278. But no particular form of words is necessary; it is sufficient if

the words used plainly indicate to the party that he is called upon to perform his neglected duty: *State v. Bancroft*, 22 Kan. 170. In Illinois, under an act to protect the consignors of fruit, grain, etc., to be sold on commission, a demand for the property or its proceeds is essential to constitute the offense: *Wright v. People*, 61 Ill. 382. While a demand need not be alleged in an indictment in some states, yet the question whether a demand has been made or not may become material in some cases to establish fraudulent conversion, a demand being only one class of evidence to establish fraudulent conversion: *State v. Reynolds*, 65 N. J. L. 424, 47 Atl. 644; *People v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524.

But since a demand is only one means of proving a fraudulent conversion, it follows that if other evidence is available, a demand need not be proved. Hence, where the embezzler has fled after the alleged embezzlement, and his acts and conduct in connection with his flight were of such a character as to indicate that his intent was to fraudulently convert the property which he retained in his possession, this is sufficient proof of a fraudulent conversion, and no demand need be made: *State v. Reynolds*, 65 N. J. L. 424, 47 Atl. 644. As is stated in some of the cases, a demand need not be proven where the embezzler absconds: *Kossakowski v. People*, 177 Ill. 563, 53 N. E. 115; *People v. Carter*, 122 Mich. 668, 81 N. W. 924. Where, by the agreement under which the defendant is employed, a time is definitely fixed for him to account for money received, and it appears that he has lawfully received money of his employer, for which he has failed to account, and has converted the same to his own use, this is evidence from which the jury may find embezzlement without a demand: *State v. Reynolds*, 65 N. J. L. 424, 47 Atl. 644. If admissions of the defendant show a fraudulent and felonious taking of money, a formal demand for its return need not be shown: *People v. Coxe*, 134 Cal. xix, 66 Pac. 725. Proof of a felonious conversion is all that is required, unless the statute requires that a demand should be made: *Wallis v. State*, 54 Ark. 611, 16 S. W. 821; *State v. Tompkins*, 32 La. Ann. 620; *Commonwealth v. Tuckerman*, 10 Gray, 173; *State v. Porter*, 26 Mo. 201. Demand is unnecessary where there has been an actual embezzlement and fraudulent appropriation: *State v. New*, 22 Minn. 76. As pithily stated in *Commonwealth v. Hussey*, 111 Mass. 432: "A fraudulent conversion to the defendant's own use would be embezzlement, whether demand were made or not."

If a public officer is, by statute, required to pay over funds at a definite time, which he fails to do, and this is shown, together with the fact that he has applied the funds to his own use, embezzlement may be found from such facts without a demand: *State v. Reynolds*, 65 N. J. L. 424, 47 Atl. 644. And a demand upon a retiring county treasurer, by his successor, for funds remaining in his

hands is not necessary: *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490.

e. By Public Officers.—The mere failure of a public officer to pay over money due from him is not sufficient proof of embezzlement, where there has been no conversion or misapplication of the funds: *State v. Hunnicut*, 34 Ark. 562. Even the willful omission to pay over money may not be embezzlement, since the money might be retained under a bona fide claim of right: *People v. Westlake*, 124 Cal. 452, 57 Pac. 465. The failure of a county trustee to pay over money in his hands, belonging to the county, to his successor, is, if unexplained, evidence of a conversion to his own use: *State v. Leonard*, 6 Cold. 307; *State v. Cameron*, 3 Heisk. 78. And the failure of a public officer to deliver to his successor in office the money remaining in his hands, upon a demand therefor, may be made by statute embezzlement per se: *State v. Ring*, 29 Minn. 78, 11 N. W. 233. A county treasurer, who takes false credit for the payment of a claim which he knew that his predecessor had paid, but had failed to mark paid, may be found guilty of embezzlement: *State v. Baumhager*, 28 Minn. 226, 9 N. W. 704. The failure of an insurance agent to pay over money for thirty days may be made embezzlement by statute: *State v. Hopkins*, 56 Vt. 250. In Nebraska, the disbursement of public funds by a city treasurer, except upon a warrant drawn by the proper authorities, constitutes embezzlement: *Bolln v. State*, 51 Neb. 581, 71 N. W. 444.

VIII. Who may Commit the Offense.

a. Servants.—In most of the statutes defining embezzlement, servants are almost uniformly provided for and made one of the classes of persons who can commit the crime of embezzlement. This is apparent from the many cases heretofore cited: See, further, *State v. Costin*, 89 N. C. 511; *Ex parte Ricord*, 11 Nev. 287; *Jones v. State*, 59 Ind. 229. A statute in relation to embezzlement which embraces all persons who fraudulently convert property to their own use, which has been intrusted to them for the purpose of being carried or delivered, includes servants: *Johnson v. Commonwealth*, 5 Bush, 430. An agent or servant, to be within the meaning of the statute, must not be the mere casual employment of one who goes on errands: *Johnson v. State*, 9 Baxt. 279. Neither does such a statute include the relation arising out of a contract of sale: *State v. Barton*, 125 N. C. 702, 34 S. E. 553. One who takes raw material to manufacture into goods is not a servant: *Commonwealth v. Young*, 9 Gray, 5; *People v. Burr*, 41 How. Pr. 293. A constable employed to collect certain demands without suit is not a servant within the meaning of an embezzlement statute: *People v. Allen*, 5 Denio, 76.

b. Agents.—In like manner, embezzlement by agents is provided for by the statutes of most of the states: *Case v. State*, 26

Ala. 17; *Ex parte Hedley*, 31 Cal. 108; *Territory v. Maxwell*, 2 N. Mex. 250; *State v. Reilly*, 4 Mo. App. 392; *State v. Ezzard*, 40 S. C. 312, 18 S. E. 1025. One employed by the maker of a promissory note to sell it, receive the proceeds, and pay them over specifically to a third person, is an agent: *Commonwealth v. Foster*, 107 Mass. 221. One, not a professional collector, employed to collect money for another, is an agent within the meaning of an embezzlement statute: *Campbell v. State*, 35 Ohio St. 70. A person employed to make but one collection is an agent: *State v. Barter*, 58 N. H. 604; for an agent to do a single thing for a particular purpose is within the meaning of the statute: *State v. Foster*, 1 Penne. (Del.) 289, 40 Atl. 939. The length of employment is immaterial; a casual as well as a continuous employment of one as agent falls within the contemplation of the statute: *Foster v. State*, 2 Penne. (Del.) 111, 43 Atl. 265. One who acts as a collection agency is not an agent within the meaning of the statute, although employed only by a single firm to collect its bills: *Commonwealth v. Libbey*, 11 Met. 64, 45 Am. Dec. 185. Such an agency was, in this case, said to stand on the same footing as commission merchants, auctioneers, and attorneys authorized to collect demands. So an auctioneer who collects money on the sale of his employer's goods is not an agent: *Commonwealth v. Stearns*, 2 Met. 343. An agent to sell pianos is one who may embezzle such property within the meaning of the statute: *State v. Adams*, 108 Mo. 208, 18 S. W. 1000. The local agent of an express company is an "agent" who may embezzle: *State v. Smith*, 57 Kan. 657, 47 Pac. 535. An agent is still such, and the relation of principal and agent continues and is not changed to that of debtor and creditor by the fact that the principal gave his agent some time within which to make good the shortage in his accounts: *State v. Thomson*, 155 Mo. 300, 55 S. W. 1013. "Any agent" includes the agent of any party, whether private person, partnership, corporation, or the state: *State v. Bancroft*, 22 Kan. 170. Under the Kentucky statute it was only the agent of a corporation who could embezzle money placed under his care or management for safekeeping. The agent of a private person could commit the crime only when the money was given to him for delivery at some place or to some person: *Barclay v. Breckinridge*, 4 Met. (Ky.) 374. So an agent of a church who solicits and collects funds for the church is not guilty of embezzlement under this act: *Shelburn v. Commonwealth*, 85 Ky. 173, 3 S. W. 7. And under an early Missouri statute, only agents of corporations could be indicted for embezzlement: *Hammel v. State*, 5 Mo. 260. Few of the statutes are so narrow and restricted in their operation. They usually include any agent: See *State v. Bancroft*, 22 Kan. 170. A mail rider in the service of the United States government, who purloins money from a registered letter in a mail bag, is not the agent or servant of the person who sent the letter: *Brewer v. State*, 83

Ala. 113, 3 Am. St. Rep. 693, 3 South. 816. Receivers are not agents within the meaning of the Kansas crimes act defining embezzlement: *State v. Hubbard*, 58 Kan. 797, 51 Pac. 290.

c. Partners.—Generally speaking, one partner cannot embezzle the funds of the partnership, for the property embezzled must be the property of another: *State v. Reddick*, 2 S. Dak. 124, 48 N. W. 846. Partners sustain the character of principals as well as agents, and have a community of interest in the partnership property, and, therefore, cannot embezzle it: *Napoleon v. State*, 3 Tex. App. 522. The giving of money to another to invest, the profits to be divided between the parties, creates a partnership, and not a bailment within the meaning of the embezzlement statute: *Dancy v. State (Tex.)*, 53 S. W. 886.

As long as a partnership contract is executory only, funds which come into the possession of one of the parties and which are the property of the other may be embezzled: *Napoleon v. State*, 3 Tex. App. 522. The agent and cashier of an unincorporated banking association, although a shareholder, and in some respects a partner, may be guilty of embezzling the association funds which come into his possession by virtue of his agency: *State v. Kusnick*, 45 Ohio St. 535, 4 Am. St. Rep. 564, 15 N. E. 481. So a private banker may be convicted of embezzlement by proof that he was a member of a private banking partnership, and that the money embezzled was deposited with him as the manager of such partnership: *Carr v. State*, 104 Ala. 43, 16 South. 155. A surviving partner, who was engaged in winding up the partnership affairs, was held to be acting in a fiduciary capacity, in *State v. Matthews*, 129 Ind. 281, 28 N. E. 703, and could be convicted for embezzlement under a statute defining the crime by administrators, executors, and other persons acting in a fiduciary capacity.

d. Bailees.—Probably under most of the embezzlement statutes at the present time, practically any bailee may be guilty of embezzlement: *People v. Poggi*, 19 Cal. 600; *Belt v. State*, 103 Ga. 12, 29 S. E. 451; *Commonwealth v. Chathams*, 50 Pa. St. 181, 88 Am. Dec. 539. But this has not always been the case. Thus it has been held that a bailee who hires property for his own use is not within the embezzlement statute: *Watson v. State*, 70 Ala. 13, 45 Am. Rep. 70. Such statutes were said to contemplate only those bailments in which the bailee had possession of personal property for the benefit of the bailor: *Reed v. State*, 16 Tex. App. 586. But under later Texas statutes this is not the rule, and a bailee who hires property for his own use may embezzle it: *Williams v. State*, 30 Tex. App. 153, 16 S. W. 760; *Brooks v. State*, 26 Tex. App. 184, 9 S. W. 562.

Property left with a commission agent to be sold on commission may be embezzled: *Morehouse v. State*, 35 Neb. 643, 53 N. W. 571; *State v. Crosswhite*, 130 Mo. 358, 51 Am. St. Rep. 571, 32 S. W.

991. Property delivered to a bailee to be carried for hire may be embezzled: *State v. Stoller*, 38 Iowa, 321. The early Wisconsin statute relating to embezzlement applied only to bailees who carried property for hire, such as common carriers and the like: *White v. State*, 20 Wis. 233. In Kentucky, the bailment to a private person must be for the purpose of delivery, or embezzlement could not be committed: *Barclay v. Breckinridge*, 4 Met. (Ky.) 374. Under a sale of property, in which the title is not to pass until the purchase price is paid, the purchaser is not such a bailee as can commit embezzlement of the property: *Krause v. Commonwealth*, 93 Pa. St. 418, 39 Am. Rep. 762.

e. Attorneys.—An attorney at law may be guilty of embezzling the money of his client which comes into his possession: *People v. Treadwell*, 69 Cal. 226, 10 Pac. 502; *State v. Belden*, 35 La. Ann. 823. An attorney at law who collects money for his client acts as his agent, and may embezzle such money: *People v. Converse*, 74 Mich. 478, 16 Am. St. Rep. 648, 42 N. W. 70; *George v. People*, 167 Ill. 447, 47 N. E. 741. The intimation, in *Commonwealth v. Libbey*, 11 Met. 64, 45 Am. Dec. 185, that an attorney who collects money for his client is not an agent within the meaning of the embezzlement statute, is a dictum which would seem to be indefensible, though it was approved in *State v. McLane*, 43 Tex. 404, under the terms of the Texas statute.

f. Administrators and Guardians.—Administrators are frequently enumerated in statutes as persons who may commit embezzlement of funds intrusted to their care: See *State v. Adamson*, 114 Ind. 216, 16 N. E. 181; *State v. Matthews*, 129 Ind. 281, 28 N. E. 703; *People v. Hiller*, 113 Mich. 209, 71 N. W. 630.

Such statutes usually read that administrators, guardians, and other trustees may be guilty of embezzlement: *State v. Adamson*, 114 Ind. 216, 16 N. E. 181; *People v. Page*, 116 Cal. 386, 48 Pac. 326; *State v. Gillis*, 75 Miss. 331, 24 South. 25. Congress has power to declare that the embezzlement by a guardian of money which he, on behalf of his wards, has received from the government as a pension due to them, is an offense against the United States: *United States v. Hall*, 98 U. S. 343.

A public administrator may be guilty of "misdemeanor in office" by embezzling money received by him after his term of office has expired: *State v. Borowsky*, 11 Nev. 119.

g. Assignees in Insolvency.—An assignee for the benefit of creditors may be guilty of embezzlement if he fraudulently misappropriates the trust property: *People v. De Lay*, 80 Cal. 52, 22 Pac. 90.

h. Corporation Officers.—Officers of corporations may be guilty of embezzling property in their possession under the statutes of most of the states: *People v. Leonard*, 106 Cal. 302, 39 Pac. 617; *State v. Goode*, 68 Iowa, 593, 27 N. W. 772; *Commonwealth v. Tuck-*

erman, 10 Gray, 173; *People v. Sherman*, 133 N. Y. 349, 31 N. E. 107. It is sufficient to show that the corporation existed as a de facto corporation: *People v. Leonard*, 106 Cal. 302, 39 Pac. 617. The statute of Georgia was held to include within its terms only domestic corporations: *Cory v. State*, 55 Ga. 236. And the state was deemed not to be a corporation within the meaning of the Kansas statute: *State v. Bancroft*, 22 Kan. 170.

The statutes of some of the states include the officers of unincorporated associations: *Laycock v. State*, 136 Ind. 217, 36 N. E. 137; *Shinn v. Commonwealth*, 32 Gratt. 899.

i. Bank Officers.—Naturally, bank officers are usually included within the terms or the meaning of statutes defining embezzlement: *Reeves v. State*, 95 Ala. 31, 11 South. 158; *Commonwealth v. Wyman*, 8 Met. 247. Hence, a bank teller may commit embezzlement of funds deposited: *State v. Tuller*, 34 Conn. 280. As also may a bank cashier: *State v. Yelter*, 54 Kan. 277, 38 Pac. 320. Though embezzlement by the cashier of a bank was not a common-law offense: *Commonwealth v. Ketner*, 92 Pa. St. 372, 37 Am. Rep. 692.

The Pennsylvania statute relating to embezzlement by bank officers does not apply to national banks: *Commonwealth v. Ketner*, 92 Pa. St. 372, 37 Am. Rep. 692. The statute of Connecticut was applied to national bank officers, however, in *State v. Tuller*, 34 Conn. 280, the court holding that where the act of Congress creating national banks provided for the punishment of embezzlement of the property of the bank by its officers, a state statute providing for the punishment of embezzlement by a bank officer of the property of the bank's customers deposited with it is applicable to national banks.

j. Public Officers.—Embezzlement by public officers is expressly provided for in most of the states: See *State v. Griswold*, 73 Conn. 95, 46 Atl. 829; *Britton v. State*, 77 Ala. 202; *State v. Stone*, 40 Iowa, 547; *People v. McKinney*, 10 Mich. 54; *State v. Boody*, 53 N. H. 610; *Commonwealth v. Morrissey*, 86 Pa. St. 416; *Bartley v. State*, 53 Neb. 310, 73 N. W. 744.

The statutes include within their meaning officers de facto as well as those de jure: *State v. Stone*, 40 Iowa, 547; *State v. Goss*, 69 Me. 22; *Bartley v. State*, 53 Neb. 310, 73 N. W. 744.

State and county treasurers are always public officers, who are liable for embezzlement: *Bartley v. State*, 53 Neb. 310, 73 N. W. 744; *People v. McKinney*, 10 Mich. 54; *State v. Smith*, 13 Kan. 274. A school treasurer is a municipal officer: *Commonwealth v. Morrissey*, 86 Pa. St. 416. Tax collectors are public officers indictable for embezzlement: *State v. Griswold*, 73 Conn. 95, 46 Atl. 829; *State v. Goss*, 69 Me. 22; *Britton v. State*, 77 Ala. 202. A selectman is a public officer who may be "a receiver of public money" within the meaning of an embezzlement statute: *State v. Boody*,

53 N. H. 610. The treasurer of a state university is a public officer within the meaning of an embezzlement act: *Spalding v. People*, 172 Ill. 40, 49 N. E. 993. So, also, is the secretary of the board of harbor commissioners: *People v. Gray*, 66 Cal. 271, 5 Pac. 240; and a deputy sheriff authorized to collect taxes: *State v. Brooks*, 42 Tex. 62. Public officers have been held to include municipal officers, in *State v. Isensee*, 12 Wash. 254, 40 Pac. 985; township officers, in *People v. Bringard*, 39 Mich. 22, 33 Am. Rep. 344; *State v. Cleveland*, 80 Mo. 108; *State v. Morton*, 21 Ohio St. 669; and county officers, in *State v. Smith*, 13 Kan. 274; *Commonwealth v. Bodley*, 17 Ky. Law Rep. 561, 31 S. W. 463. But a county auditor who is not charged with the custody and possession of public money is not within the terms of the Ohio statute: *State v. Newton*, 26 Ohio St. 265. Nor is the clerk of the county commissioners a public officer within the Maryland statute: *State v. Denton*, 74 Md. 517, 22 Atl. 305. Nor is the clerk of a superior court, who embezzles money paid him by an administrator for one of the distributees of an estate, such money not being held in trust for any city or county: *State v. Connelly*, 104 N. C. 794, 10 S. E. 469.

SMITH v. STATE.

[129 Ala. 89, 29 South. 699.]

INFAMOUS CRIMES.—PERSONS CONVICTED OF TREASON, FELONY AND THE CRIMEN FALSI were, at common law, rendered infamous, and were disqualified as witnesses in civil and criminal cases. (p. 48.)

INFAMOUS CRIMES.—THE TEST as to whether a crime is infamous is whether it shows such depravity in the perpetration, or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath. (p. 48.)

INFAMOUS CRIMES.—IT IS NOT THE SEVERITY OF PUNISHMENT, but the nature of the offense, which creates legal infamy and disqualifies a witness. (p. 48.)

INFAMOUS CRIMES.—THE CRIMES OF ASSAULT AND OF CARRYING CONCEALED WEAPONS are not infamous. (p. 48.)

WITNESSES—IMPEACHING.—EVIDENCE OF THE CONVICTION FOR AN ASSAULT or of carrying concealed weapons is not admissible for the purpose of discrediting a witness. (p. 48.)

Indictment for an assault with intent to rape. The defendant testified in his own favor, after which evidence that he had been convicted of assault and battery and of carrying concealed weapons was introduced by the state to affect his credibility.

P. E. Culli, for the appellant.

Charles G. Brown, attorney general, for the state.

⁹¹ TYSON, J. The rule of the common law was that persons convicted of treason, felony and the *crimen falsi* were rendered infamous, and were disqualified as witnesses in civil and criminal cases. In determining whether a crime was infamous, the test seems to be "whether the crime shows such depravity in the perpetration or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath." It was not the severity of punishment, but the nature of the offense, which created legal infamy and disqualification of a witness: ⁹² *Sylvester v. State*, 71 Ala. 17; *Taylor v. State*, 62 Ala. 164. The common-law rule which prevailed in this state was changed by the enactment of the statute now embodied in section 1795 of the code, so as to relieve a witness of disqualification by reason of having been convicted of an infamous crime, except where the conviction is for perjury or subornation of perjury; providing, however, that evidence of such conviction goes to his credibility. It is too clear for argument that the words "infamous crime" employed in this section have the same meaning as they had at common law.

So, too, it is also clear that the crimes of assault and carrying concealed weapons are not infamous. Not being infamous, evidence of the conviction of the defendant for those crimes for the purpose of discrediting his testimony was inadmissible. Not being admissible for this purpose, it was not admissible for any other.

Under the evidence there was no error in refusing the charge requested by defendant: *Dudley v. State*, 121 Ala. 4, 25 South. 742; *Brown v. State*, 121 Ala. 9, 25 South. 744; *Talbert v. State*, 121 Ala. 33, 25 South. 690.

Reversed and remanded.

An Infamous Crime is generally defined as one punishable with imprisonment in a state prison: *Gudger v. Penland*, 108 N. C. 593, 23 Am. St. Rep. 73, 13 S. E. 168. The conviction of an infamous crime disqualified one from being a witness at the common law: See the monographic note to *Lodge v. State*, 82 Am. St. Rep. 35.

The Impeachment of Witnesses by proof of their participation in crime is discussed in the monographic note to *Lodge v. State*, 82 Am. St. Rep. 84-89.

EX PARTE MILLER.

[129 Ala. 130, 30 South. 611.]

INJUNCTION—BOND.—In Alabama there can be no injunction, and consequently no contempt for its violation, until a bond has been given. (p. 49.)

INJUNCTION—VIOLATION OF.—Where an injunction is not to take effect until a bond is executed, acts done between the time of granting the injunction and the execution of the bond, which would be violative of the writ if fully operative, do not constitute a breach of the injunction. (pp. 49, 50.)

THE VIOLATION OF THE SPIRIT OF AN INJUNCTION, even though its strict letter may not have been disregarded, is a breach of the mandate of the court. (p. 50.)

INJUNCTION.—COURTS WILL NOT PERMIT DEFENDANTS TO EVADE RESPONSIBILITY for violating an injunction by doing through subterfuge that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing. (p. 50.)

AN INJUNCTION AGAINST PROCEEDING FURTHER IN A SUIT, which does not become operative until after a judgment in such suit has been rendered, is violated by the issuance of execution or a writ of possession thereon. (p. 52.)

CONTEMPT PROCEEDINGS MAY BE ENTERTAINED, though the equities of the cause have not been determined. (p. 53.)

CONTEMPT—NOTICE.—ONE WHO APPEARS AND DEFENDS against contempt proceedings need not be served with notice to show cause therein. (p. 53.)

Original petition in the supreme court for a writ of mandamus or prohibition to vacate a decree rendered in contempt proceedings and to prohibit the enforcement of such decree.

L. C. Dickey, for the petitioner.

J. W. Bush, contra.

133 HARALSON, J. 1. In this state it is provided that injunctions can be issued alone, upon the execution of bonds, such as are prescribed by the statute. Section 786 of the code provides that no injunction must issue to stay proceedings after judgment in a personal action until the party applying for it gives bond and security, as prescribed. Section 787 directs that no injunction must issue to stay proceedings at law for the recovery of land, unless the party give bond and security as provided; and section 788 requires that in other cases than those specified above the party must give bond with surety

in such sum as the officer granting the injunction directs, payable and conditioned as prescribed. These sections cover any and every case that may arise for an injunction. To issue one without the bond prescribed would be irregular: *Thorington v. Gould*, 59 Ala. 461. Whatever might be the rule, in the absence of statutory regulations on the subject, as to the time the writ becomes operative, we apprehend, under our statute, it can never be operative until the injunction bond has been executed. Such an order is conditional in its nature, and there can be no injunction, and consequently no contempt for its violation, until the bond has been given: 2 High on Injunctions, sec. 1429; 1 Beach on Injunctions, sec. 269; *Winslow v. Nayson*, 113 Mass. 411.

It is furthermore held that where an injunction has been granted, but not to take effect until a bond is executed, acts done between the time of granting the injunction ¹⁸⁴ and the execution of the bond, which would be violative of the writ if fully operative, do not constitute a breach of the injunction: 1 Beach on Injunctions, sec. 253.

2. In determining whether there has been an actual breach of the writ, it is necessary to observe the objects for which the relief was sought and granted and the circumstances attending the case; and, as observed by Mr. High, "the violation of the spirit of an injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court": High on Injunctions, sec. 1446; 1 Beach on Injunctions, sec. 251; Kerr on Injunctions, 641. Again: "Where . . . part of the injury complained of has already been done by defendant, before the injunction issues, but after the writ is allowed, he does acts in furtherance of such injury, he cannot protect himself from the consequences of a violation, by the fact that the injunction did not in terms prohibit the act which he committed, and he will accordingly be held guilty of contempt": High on Injunctions, sec. 1447. "Nor will the court permit defendants to evade responsibility for violating an injunction by doing, through subterfuge, that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing": High on Injunctions, sec. 1433; *Gibbs v. Morgan*, 39 N. J. Eq. 79.

In this proceeding it appears that on the 14th of March, 1898, in a bill pending in the chancery court of Shelby county, an order was granted by a circuit judge for a writ of injunc-

tion, upon the execution by complainants of a bond in the sum of three hundred dollars, conditioned and payable as provided by law, and on the 28th of the same month the bond was duly executed. The prayer of the bill for the injunction was, that defendants (Frank and J. B. Miller) be commanded "to take no further steps in the suits as shown by the paragraphs of the bill," etc., one of which suits was for a personal judgment against complainants on mortgage notes, and the other, an action against them, in the nature of an action of ejectment, for the recovery of the possession of the mortgaged lands—the latter suit being the one out of which this proceeding grew, and both of them pending in the circuit court of Shelby county.

135 The writ of injunction issued on the 28th of March, 1898, on an injunction bond taken and approved on the same day, enjoining defendants (to state its language) "from the further prosecution of the above-named suit for judgment on notes for six hundred and fifty dollars, or from the further prosecution of said suit in ejectment filed by you in said circuit court on the sixth day of January, 1898, against the said William Kirkpatrick and Sarah Kirkpatrick, until further orders of this court," and the same was duly executed on said Frank Miller on the 30th of March, 1898.

On the 24th of March, the respondents—Millers—took a judgment in said circuit court for the lands described in the bill, which was four days before the writ of injunction was issued and placed in the hands of the sheriff and served on the defendants. On the 18th of April, thereafter, a motion was made by defendants to discharge the injunction, which motion, as averred, is still pending in said chancery court; and on the 29th of April, as is further averred, the defendants "caused the issuance of an execution against complainants," and on the 2d of June, 1898, they were, "under and by virtue of said execution, dispossessed of the lands described in the bill of complaint," etc.

3. The evidence shows clearly enough that when complainants were dispossessed of said lands, the said Millers knew and had notice of the issuance of said writ of injunction. The petition of complainants for a rule to show cause why the defendant Frank Miller should not be attached, was made and filed in said chancery court on the 16th of March, 1899, and on the same day he filed in said court a demurrer to and motion to strike said petition. At the September term, 1899, of said

court the demurrers to and motion to strike said petition were overruled. Afterward the court made its decree in said contempt proceedings, ordering said Frank Miller to be attached and committed to jail, unless (to quote the language of the order) "said Frank Miller shall forthwith, and within ten days from and after the day on which the notice of this order shall be served upon him, return and restore the possession of the premises described in the bill in this case to the complainants [therein]," etc.

¹³⁶ 4. It thus appears that the injunctive writ was to enjoin said Miller "from the further prosecution of said suit in ejectment," which writ was served on him on the 30th of March, 1898, the bond for its issuance having been filed on the 28th of that month, and that on the 24th of March, 1898, said Miller obtained a judgment by default against the petitioner for contempt for the recovery of said lands.

The contention of the said Miller is, that he was not restrained by said writ from taking any steps in said cause until the bond for the writ had been executed, and until the writ itself had been served on him; that he took his judgment in said cause four days before said bond had been executed, and, therefore, he was guilty of no violation of the mandate of said writ for having taken his said judgment. He further contends that the injunction, being against the further prosecution of said suit, was *functus officio*, since the judgment when the writ was issued had been already obtained, and that the issuance of execution or writ of possession thereon thereafter was no violation of the terms of said injunction, nor was the execution of the writ of possession in the ejection of the petitioners from the lands, and placing said Miller in possession thereof, any violation of said writ rendering him liable for disobedience to the orders of said court.

It must be conceded that procuring said judgment at the date it was taken, without more, was not a literal violation of the terms of said writ, constituting a breach thereof: Beach on Injunctions, sec. 253. The object and spirit of the injunction, however, was not simply to prevent a judgment in that cause, but its real purpose and spirit were to prevent the plaintiff therein from dispossessing defendant of said lands. If no writ of possession could have been issued on such a judgment the judgment itself would have been barren, and the defendant therein would have had no occasion to seek to enjoin it. It was to prevent his being turned out of his

premises that the defendant in said judgment was seeking the injunctive process of the court. The words "from the further prosecution of said suit," when regard is had to the ¹³⁷ terms of the writ, its purposes, and the condition of the parties, are not wrested from their proper signification, when made to include any further proceeding, looking to the accomplishment of the main purpose of said action—the ejection of defendant from his lands; and, properly construed, they do include the issuance of said writ of possession and its execution, as well as the obtaining of the judgment itself. Courts exact a strict and implicit obedience to their injunctions, and will not permit them to be defeated by mere subterfuges on the part of those required to obey them; and the doctrine so well settled is of application, that the courts will not "permit defendants to evade responsibility for violating an injunction by doing through subterfuge that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing": High on Injunctions, sec. 1433; Wayman v. Southard, 10 Wheat. 1, 29; 24 Am. & Eng. Ency. of Law, 1st ed., n. 2; Gibbs v. Morgan, 39 N. J. Eq. 79. We conclude that the issuance of said writ of possession was a manifest and palpable violation of the injunction.

5. That a proceeding of this character cannot be entertained until the equities of the cause in which it is made had been determined is against unbroken authority on the subject: High on Injunctions, sec. 1416, and cases cited; Beach on Injunctions, sec. 247. Nor is there any merit in the insistence that the petitioner was not served with notice to show cause why he should not be attached. This was unnecessary when he appeared, as he did, and defended against the proceeding.

Again, the objection that the decree in the contempt proceeding was rendered in vacation, and is a decree of the chancellor merely and not of the court, is without foundation. It appears by the decretal order that this proceeding was submitted by consent at the September term of the court, 1900, and held for decree in vacation. The decree was rendered on January 21st and filed January 22, 1901, and is within rule 79 of chancery practice.

6. We have examined all the objections to the order of the court below in awarding the attachment for ¹³⁸ contempt, and finding them to be without merit, the application here for mandamus or prohibition is denied. The order of this court,

made and entered on the 14th of February, 1901, suspending the execution of said attachment writ, is revoked, leaving the same in full force, to be executed in the manner therein directed.

Petition for mandamus or prohibition denied.

A Party is Bound by an Injunction from the time he has notice of its issuance. There need be no formal service of the writ. But if an indemnity bond has not been filed, the injunction is inoperative: *Farnsworth v. Fowler*, 1 Swan, 1, 55 Am. Dec. 718, and note; notes to *People v. Sturtevant*, 59 Am. Dec. 548; *Harnig v. Kauffman*, 78 Am. Dec. 104.

One Who Violates an Injunction, by issuing and levying an attachment, will not be permitted to gain any advantage thereby: *Farmers' Loan etc. Co. v. Bankers' etc. Tel. Co.*, 148 N. Y. 313, 51 Am. St. Rep. 690, 42 N. E. 707.

BARRETT v. CITY OF MOBILE.

[129 Ala. 179, 30 South. 36.]

MUNICIPAL CORPORATIONS—SUITS AGAINST—TORTS. A statute requiring "claims" against cities to be presented to the city council before suit can be brought thereon applies to charges arising in tort. (p. 55.)

MUNICIPAL CORPORATIONS—SUITS AGAINST—PLEADING.—Where "claims" against a city must be presented to the city council before suit is brought, a complaint in an action in tort against a city must aver that such presentation has been made. (p. 55.)

IN TRESPASS DE BONIS ASPORTATIS, A DEFENSE based on legal authority for the taking complained of is in justification of the act, and in order to be proved must be pleaded specially. (p. 55.)

PLEADING—PROOF TO MITIGATE DAMAGES.—UNDER THE GENERAL ISSUE, the fact that the defendant acted under a supposed, though invalid, authority may be proven for the limited purpose of mitigating or preventing exemplary damages. (p. 55.)

PLEADING.—IN TROVER A VALID AUTHORITY FOR APPROPRIATION OR DESTRUCTION OF PROPERTY involved may be proven under the general issue and in bar of the action. (pp. 55, 56.)

IN AN ACTION OF TROVER FOR THE KILLING OF AN ANIMAL BY A HEALTH OFFICER, it is competent to show in defense that the animal was killed in pursuance of a reasonable police regulation in promotion of the public health. (p. 56.)

HEALTH OFFICER—POWER TO DESTROY PROPERTY. In the absence of some regulation made, or special authority conferred by the board of health, the court, or the corporate authorities, a city health officer as such has no authority to destroy property, whether infected or not. (p. 57.)

Action in trespass and trover against the city of Mobile and its health officer, for the killing of a mule, which was killed by order of the health officer as being an infected and dangerous animal.

John E. Mitchell, for the appellant.

B. B. Boone, contra.

¹⁸⁴ SHARPE, J. By the charter act of the city of Mobile (Acts 1896-97, p. 542), it is provided: "That no claim against the city of Mobile shall be sued on until a statement thereof, giving date of accrual, name and residence of original claimant, and of assignee, if any, circumstances and amount, shall have been filed with the clerk for consideration of the general council, and either rejected by them or held for sixty days without action."

The word "claim" as used in this provision is comprehensive enough to include charges against the city arising in tort as well as ex contractu. The legislative intention was to protect the city from expenses of unnecessary litigation by affording it opportunity to settle and discharge its liabilities without suit. The same necessity exists for such protection in respect to ¹⁸⁵ torts as in other claims, and without applying the requirement to them the legislative intention cannot be wholly carried out.

The right to sue the city without first presenting the claim is taken away by the statute. In bringing suit the plaintiff should show by his complaint a cause for which an action will lie. To that end the complaint should aver presentation according to the statutory requirement. For want of such averment the complaint in the present case was subject to the demurrer interposed to it as a whole.

We are aware that there is conflict in the authorities both as to whether the word "claims" as used in statutes requiring presentation before suit applies to tort and also as to the necessity of averring compliance with the requirement. We think, however, that our conclusions on both those questions are supported by the decision of this court made with reference to an analogous requirement respecting the presentation of claims against counties before suit, and found in section 13 of the present code: See *Schroeder v. Colbert County*, 66 Ala. 137; *Shinbone v. Randolph County*, 56 Ala. 183.

Amendments to the complaint left it standing against the defendant Goode alone, on a count in trespass joined with a count in trover, and not guilty was the only plea. The two causes of action proceed on different theories, and are subject to dissimilar defenses.

In trespass *de bonis asportatis*, as in other species of trespass, a defense based on legal authority for the taking complained of is in justification of the act, and, like other pleas in confession and avoidance, must be pleaded specially; otherwise the defense is not allowed to be proved: *Womack v. Bird*, 51 Ala. 504, 63 Ala. 500; *Chitty on Pleading*, 16th Am. ed., 532. Though the fact that the defendant acted under a supposed, though invalid, authority may, according to the more recent decisions of this court, be proven for the limited purpose of mitigating or preventing exemplary damages: *Stephenson v. Wright*, 111 Ala. 579, 20 South. 622; *Boggan v. Bennett*, 102 Ala. 400, 14 South. 742.

In trover a valid authority for appropriation or destruction of property involved may be proven under the ¹⁸⁶ general issue and in bar of the action: *Gould on Pleading*, sec. 57; 9 *Bacon's Abridgment*, 672; *Young v. Cooper*, 6 Ex. 259; *Kline v. Husted*, 3 *Caines*, 275; *Pemberton v. Smith*, 3 *Head*, 18; *Miller v. Knapp* (Pa.), 19 *Atl.* 555.

In *Gould on Pleading*, section 57, it is laid down that "as the conversation, which is the gist of the action in trover, is *ex vi termini* a tortious act which cannot in law be justified or excused, it is manifest that any plea alleging matter of justification or excuse (as a license from the plaintiff—an authority derived from the law, etc.) is equivalent to the plea of not guilty, since it must involve a denial of the conversion."

There are decisions opposed to the admission of such a defense without a special plea, and the question seems not to have been expressly decided by this court, though as favoring the rule we announce there is an intimation in *Hopkinson v. Shelton*, 37 Ala. 306, where in passing on a plea setting up that the property alleged to have been converted was taken under execution, the court said that in view of our statute allowing a plurality of pleas "it was no objection to the second plea that it amounted to the general issue." A conversion is necessarily wrongful and cannot be justified. Where the appropriation is rightful there is no conversion; therefore a plea showing that fact directly contravenes the complaint, and is not in confession and avoidance or in justification.

Under the pleading in the present case it was competent under the count in trover, and in bar of it, to show by proof, if it existed, that the animal was killed in pursuance of a reasonable police regulation in promotion of the public health: Tiedeman on State and Federal Control of Personal Property, 828.

The evidence actually introduced tending to show the defendant's official character, the information on which, and the circumstances under which, he acted in ordering the animal to be killed, were admissible under the count in trespass as tending to show he acted in good faith and as bearing on the question of exemplary damages. But the evidence did not tend to show an absolute defense to either count.

187 In a general way the duties and authority of county health officers are prescribed by chapter 58 of the code. The powers given them as executive officers in respect of the destruction of property to prevent the spread of infectious diseases are required to be exercised "under the direction and control of the county board of health, and in accordance with the health laws of the state": Code, sec. 2436. The county board of health may investigate "cases of malignant, pestilential, infectious, epidemic, and endemic diseases occurring in the county, and the causes thereof, and take such steps as may be necessary for their abatement or prevention": Code, sec. 2429. "The court of county commissioners, or the proper corporate authorities of any city or town, may, jointly or separately, invest the county board of health with such executive powers and duties as may be deemed necessary for the preservation and promotion of the public health, and for the prevention of the introduction or spread of contagious or infectious diseases, such powers to be exercised, and such duties to be performed under such rules and regulations as may be determined upon between such board and such court, or corporate authorities": Code, sec. 2431. And the charter of Mobile provides that the general council "may make, ordain, and declare such by-laws and ordinances for and concerning the removal of nuisances and the prevention and extinction of contagious or infectious diseases, and in giving effect to these powers may act in co-operation with the board of health." In the absence of some regulation made or special authority conferred by the board of health, the court, or the corporate authorities, the health officer of Mobile as such has no authority to destroy property, whether infected or not,

except when acting under a warrant from a justice or mayor as provided by section 2393. Here there was nothing to show that the defendant was authorized in either of the modes indicated, or in any legal mode, to order the destruction of the animal; consequently, there was nothing to justify that action or devert it of a tortious aspect, and the plaintiff's right to recover was made out. Therefore, the refusal to instruct the jury affirmatively in her favor ¹⁸⁸ was error, for which the judgment must be reversed. It is unnecessary to specifically pass on the other charges.

Let the judgment be reversed and the cause remanded.

Pleading.—In trespass, any matter of justification must be specially pleaded. It is not admissible under the general issue: *Finch v. Alston*, 2 Stew. & P. 83, 23 Am. Dec. 299. See, in this connection, *Alliance Trust Co. v. Nettleton Hardware Co.*, 74 Miss. 585, 60 Am. St. Rep. 531, 21 South. 396. In trover, when the complaint simply alleges title in the plaintiff without stating how he acquired it, the defendant may show under the general denial that the sale by which the plaintiff claims title was void, and that the defendant rescinded the sale and retook the property: *Johnson v. Oswald*, 38 Minn. 550, 8 Am. St. Rep. 698, 38 N. W. 630.

The Power of Boards of Health to destroy dangerous or infected property is discussed in the monographic note to *Blue v. Beach*, 80 Am. St. Rep. 214, 231.

COTTINGHAM v. GREELY BARNHAM GROCERY CO.

[129 Ala. 200, 30 South. 560.]

GARNISHMENT—CONTEST OF ANSWER—ISSUE.—In contesting the answer of a garnishee, the Alabama statutes do not require the issue to be formed at the term of court at which the answer is made, but only that the plaintiff shall controvert by his oath, at such term, that he believes the answer to be untrue. (p. 59.)

GARNISHMENT.—THE ISSUE TO BE MADE UP, AFTER A CONTEST OF THE ANSWER OF A GARNISHEE, in which the plaintiff must allege in what respect the answer is untrue, is in the nature of a complaint. (p. 59.)

GARNISHMENT.—A TENDER OF ISSUE, AFTER A CONTEST OF THE ANSWER OF A GARNISHEE, may be filed at any time before the trial. (p. 59.)

APPEAL—GARNISHMENT.—THE RULINGS OF A COURT in striking out certain pleas of a garnishee cannot be reviewed on appeal, where neither the motions, pleas, nor the rulings of the court appear in the bill of exceptions. (p. 59.)

A FRAUDULENT GRANTEE CANNOT, BY GARNISHMENT, be required to account to the creditors of his vendor for any greater sum than the value of the property acquired by him under the transfer to him. (p. 60.)

FRAUDULENT CONVEYANCES.—A FRAUDULENT GRANTEE MAY RELIEVE HIMSELF FROM LIABILITY to the creditors of his grantor by paying to bona fide creditors a sum of money equal to the value of the property transferred to him, and it is immaterial that he was forced to pay by means of the process of attachment. (p. 61.)

FRAUDULENT CONVEYANCES—PAYMENT BY GRANTEE —BURDEN OF PROOF.—If a fraudulent grantee undertakes to relieve himself from liability by showing payment to his grantor's creditors, the burden of proof is on him to show such payment, and that the debts discharged were subsisting, legal, bona fide demands against his grantor. (p. 61.)

GARNISHMENT.—IN DETERMINING THE VALUE OF NOTES AND ACCOUNTS received by a garnishee under a fraudulent conveyance, the criterion is the value of the property at the date of the transfer. (p. 62.)

THE PRINCIPLE THAT A GARNISHING CREDITOR CAN AVAIL HIMSELF ONLY OF THE LEGAL RIGHTS OF HIS DEBTOR against the garnishee is subject to an exception when the garnishee has possession of property of the debtor under a fraudulent transfer, for, though such transfer is valid against the debtor, creditors may assert its invalidity. (pp. 62, 63.)

GARNISHMENT.—CHOOSES IN ACTION in the possession of a garnishee cannot be subjected by garnishment. (p. 63.)

Garnishment proceedings against the appellant.

J. M. McMaster, for the appellant.

Logan & Vandergraaf, contra.

203 TYSON, J. The statute does not require the issue to be made at the term of the court at which the answer of the garnishee is contested. It only requires that the plaintiff, his agent or attorney, may controvert the answer by making oath, at the term the answer is made, that he believes it to be untrue: Code, sec. 2196, and authorities cited thereunder.

The issue to be made up, after a contest of the answer, under the direction of the court, in which the plaintiff must allege in what respect the answer is untrue, is in the nature of a complaint in the cause, and not entirely dissimilar in respect to stating the plaintiff's cause of action, as in the complaint of the plaintiff in a suit commenced by attachment: *Lindsay v. Morris*, 100 Ala. 546, 13 South. 619. Such a tender of issue may be filed at any time before the trial.

We cannot review the rulings of the court in striking certain pleas filed by the garnishee, for the reason **204** that neither

the motions, pleas, nor the rulings of the court appear in the bill of exceptions: *Holley v. Coffee*, 123 Ala. 406, 26 South. 239.

The cause was tried upon the issue tendered by the plaintiff and the general issue and special plea No. 11. In the tender of issue it is averred that prior to December 23, 1892, the defendants, E. N. Cottingham and J. L. Suttle, as partners composing the firm of E. N. Cottingham & Co., carried on a mercantile business in the town of Blocton, Alabama. That prior to said date they were indebted to the plaintiff for goods, wares, and merchandise sold, which indebtedness was reduced to judgment on the seventh day of June, 1894, and is still due and unpaid. That on the said twenty-third day of December, 1892, the defendants made a fraudulent sale and transfer of the goods, wares, and merchandise owned by them, as well as all the notes and accounts due to them to the garnishee and Mrs. M. A. Suttle, by executing to them jointly a bill of sale thereof, upon the recited consideration of fifteen thousand and ninety dollars and fifty cents, of which the sum of eight thousand nine hundred and eighty-three dollars and two cents was recited to be the amount of the indebtedness due by the defendants to the garnishee; and the sum of six thousand one hundred and thirteen dollars and fifty cents was recited to be the amount of the indebtedness due by the defendants, as a firm, to Mrs. M. A. Suttle. That in fact the said defendants, as a firm, were not indebted to Mrs. Suttle in any sum whatever, and that the said firm was either not indebted at all to said garnishee, or, if indebted to him in any sum, then the amount of the debt owing to him was greatly less than eight thousand nine hundred and eighty-three dollars and two cents. That the alleged debt to him was in whole or in part simulated or fictitious. It is further averred that the garnishee took possession of the stock of goods, wares and merchandise, and has retained the same, and that the value of the stock of goods was ten thousand dollars. That the garnishee has collected from the notes and accounts transferred to him and Mrs. Suttle a large sum of money, to wit, five thousand dollars.

Special plea No. 11 filed by the garnishee alleges that prior to the issuance of the writ of garnishment in this ²⁰⁵ case all the property which came into his possession under and by virtue of the bill of sale set out in the complaint was levied on by certain attachment writs returnable to the circuit court

of Bibb county, Alabama. It is further alleged that all of said property was subject to the payment of said attachment writs, and that the entire value of the property has been applied to the payment of the said prior attachments. No objection was taken to the sufficiency of this plea by demurrer or otherwise. So, then, it must be treated as presenting a material issue in the cause, and the garnishee had the right to offer evidence in support of the facts alleged in it.

But independent of the question of the sufficiency of its averments, the garnishee, if the bill of sale was fraudulent, cannot be required to account to the creditors of the vendors for any greater sum than the value of the property acquired by him under the transfer to him. The whole object of the law is to make him disgorge the ill-gotten gain by virtue of the fraudulent transaction. When he does this, either by returning the property or its equivalent in money, he cannot be punished by making him pay more. The wrong he may have done is not punitive in its character at the suit of a creditor—one for which he must be made to suffer beyond the actual loss entailed upon the creditors. This principle is clearly stated by Mr. Bump in his work on *Fraudulent Conveyances*, page 599, section 622, in this language: "An honest man will not accept a fraudulent conveyance, and a party who holds property fraudulently will, as soon as he comes to a sense of his moral duty, restore it to those to whom it belongs. He ought generally to give it back to the debtor, in order that it may be applied to his debts if wanted, or to his benefit if not necessary for that purpose. Although the law, for the purpose of discouraging fraud, will not compel him to restore it to the debtor, yet no person who possesses a sense of justice or honesty will retain it. The relation between the grantee and creditors is different; there is no express obligation between them. The creditors, however, ought to receive their debts, and the law gives them a claim to the property, ²⁰⁶ and charges the grantee as trustee in consequence of his possession. The trust is not express, but arises by operation of law, in consequence of his having in his hands that which ought to be applied to the satisfaction of their demands. It depends, therefore, on the possession of the property. If the grantee, therefore, devests himself in good faith of that which he could not retain without dishonesty before the right of the creditors to call him to account accrues, there is nothing remaining upon which to raise a trust, and the relation of trustee ceases.

The grantee, for the same reason, cannot be held to account for the property or the proceeds arising from the sale of it, which have been applied by him in good faith to the payment of the debts of the grantor. In this respect there is no distinction between a transfer which is fraudulent in fact and one which is fraudulent in law."

It can make no possible difference that the grantee is forced to pay the proceeds of the property to the creditors by means of the process of attachment. So he pays the value of the property to those to whom the property rightfully belongs, is all that is required of him. Had the grantee in the conveyance agreed to pay to the creditors the value of the property as part of the consideration of the transfer to him, and did so pay, or had he paid to the grantor the value of the property in excess of the debt due to him in pursuance of an agreement between him and the grantor, and the grantor had paid that money to his creditors, the conveyance would not have been fraudulent: *Rankin v. Vandiver*, 78 Ala. 562. Of course, if the grantee undertakes to relieve himself from liability by showing that he has applied the property to the discharge of the debts of his grantor, or paid to the creditors a sum of money equal to the value of the property, the burden of proof would rest upon him, not only to show such an appropriation by him of the property, or the payment of a sum of money equal to its value, but also to show that the debts discharged were subsisting, legal, bona fide demands against his grantor. This was the principle invoked by the garnishee by the averments of his special plea.

207 It follows that the court erred in excluding the evidence offered by the garnishee of the payment by him of certain attaching creditors, and the writs of attachment, etc., sued out by them against his grantors prior to the writ of garnishment in this case. Under the issues upon which the garnishee was forced to trial by reason of the refusal by the court to permit him to file certain pleas, there was no error in sustaining the plaintiff's objection to the evidence offered by the garnishee to prove that he had paid a number of bona fide creditors of E. N. Cottingham, etc.

It is of no consequence, under the principles above announced, that a portion of all the property was in the possession of the garnishee at the time of the service of the writ of garnishment, if it be shown by him that he has paid to bona fide creditors of his grantors, prior to the service of the

writ of garnishment, an amount of money equal to the value of the property acquired under the conveyance to him. This being so, the giving of written charge numbered 2 at the request of the plaintiff was erroneous.

Charge 11 requested by the garnishee, under the issue presented by his special plea, should have been given.

Charges 10, 12, 13, 14, and 15, hypothesized certain facts, the evidence of which was excluded by the court.

Charges 2 and 3 are framed upon the theory that the value of the notes and accounts must be admeasured or ascertained by the amount of money collected by the garnishee upon them. In determining the question of the value of the property received by the garnishee under the conveyance, the criterion is the value of the property at that date. If it consisted partly of notes and accounts, their value must be ascertained at that time. And their value is important upon the inquiry as to whether or not the transaction was fraudulent or bona fide. But it does not follow that they can be condemned in this proceeding, should the conveyance be found to be fraudulent. While the principle is well settled in this state that a garnishing creditor can avail himself only of the legal rights of his debtor against the garnishee, and that his recovery is limited to the recourse of the debtor, this principle is subject ²⁰⁸ to an exception when the garnishee has possession of money or effects of the debtor under a fraudulent transfer. In such case, notwithstanding the transfer is valid against the debtor, and he cannot be heard to gainsay it, the creditor may in this proceeding, as well as in any other, assert its invalidity: *Henry v. Murphy*, 54 Ala. 256, and authorities there cited; Code, sec. 2181. But the effects of the debtor in the possession of the garnishee, in order to be subjected, must be of such sort as that when so ordered by the court he can deliver them to the sheriff, that the latter may make sale thereof: Code, sec. 2192. "It is very clear that the court cannot direct a sale of a mere chose in action": *Jones v. Norris*, 2 Ala. 526; *Hazard v. Franklin*, 2 Ala. 349; *Craft v. Summer-sell*, 93 Ala. 430, 9 South. 593; *Levishon v. Waganer*, 76 Ala. 412.

As the judgment must be reversed and the cause remanded for a new trial, we will not discuss the action of the court in refusing to allow the garnishee to file certain pleas shown in the record. Doubtless, upon another trial, he will be permit-

ted to file pleas invoking such defenses as he may be advised are in accord with the principles announced in this opinion.

Reversed and remanded.

Attachment and Garnishment.—Real property fraudulently conveyed by a debtor is subject to attachment: *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359. See, also, *Stickney etc. Co. v. Goodwin*, 95 Me. 246, 85 Am. St. Rep. 408, 49 Atl. 1039; *Nelson v. Leiter*, 190 Ill. 414, 83 Am. St. Rep. 142, 60 N. E. 851. And choses or money in the hands of a fraudulent transferee may be subjected to garnishment: *Nicrosl v. Irvine*, 102 Ala. 648, 48 Am. St. Rep. 92, 15 South. 429; *Stern v. Butler*, 123 Ala. 606, 82 Am. St. Rep. 146, 26 South. 359.

A Conveyance Fraudulent as to Creditors of the grantor is not purged of fraud, though the grantee remains in possession and pays the debts of the grantor in excess of the value of the property: *Caldwell v. Walker*, 76 Miss. 879, 71 Am. St. Rep. 545, 25 South. 929.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. FITZPATRICK.

[129 Ala. 322, 29 South. 859.]

PROPERTY IN DOGS.—BY THE COMMON LAW, ownership of a dog carried with it property rights to afford the owner a civil remedy for injuries to the animal, but it was not a subject of larceny. (p. 64.)

A DOG IS PROPERTY, FOR THE NEGLIGENT KILLING of which an action will lie. (p. 64.)

Action to recover damages for the negligent killing of a dog.

Thomas G. Jones, for the appellant.

Gordon Macdonald, contra.

324 SHARPE, J. By the common law, ownership of a dog carried with it property rights to afford the owner a civil remedy for injuries to the animal, but which was not a subject of larceny: 4 Blackstone's Commentaries, 235. This court has followed the common-law doctrine entire as to actions for damages in *Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776, and *White v. Brantley*, 37 Ala. 430, and respecting larceny in *Ward v. State*, 48 Ala. 163, 17 Am. Rep. 31, and *Johnson v. State*, 100 Ala. 32, 14 South. 629.

In other jurisdictions the civil remedy has been generally accorded, but to justify the proposition that a dog cannot be

stolen has been difficult to an extent which has produced much conflict in decisions on that subject: See note to *Hamby v. Sampson*, 67 Am. St. Rep. 285, which collates and reviews authorities.

Still more difficulty is invited by the theory of appellee's demurrer and argument going upon the assumption that a dog, though property, when willfully injured has no such attribute as will merit the exercise of care to avoid his injury. That theory seems to be favored by the opinion in *Jameson v. Southwestern etc. R. R. Co.*, 75 Ga. 444, 58 Am. Rep. 476, but it was not necessary to the decision there made. In that opinion *Wilson v. Wilmington etc. R. R. Co.*, 10 Rich. 52, is cited as authority, but the latter decision, as is shown in *Salley v. Manchester etc. R. R. Co.*, 54 S. C. 481, 71 Am. St. Rep. 810, 32 S. E. 526, turned on the construction of a statute relating to the burden of proof on the question of negligence. In *Salley's* case, the decision was on a demurrer to a complaint claiming damages for an alleged negligence of a railroad company in running over ³²⁵ and killing a dog, and is, therefore, directly in point here. It upheld the cause of action as a conclusion resulting from what had been held on kindred questions in many adjudications referred to in the opinion. To the same effect are *St. Louis etc. Ry. Co. v. Hawks*, 78 Tex. 301, 14 S. W. 691; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754, 45 S. W. 790; *Jones v. Illinois Cent. R. R. Co.*, 75 Miss. 970, 23 South. 358.

We conclude that the complaint alleges actionable negligence, and that there was no error in overruling the demurrer or in rendering judgment final under the conditional agreement of parties.

Affirmed.

Property in Dogs and the Remedies for its enforcement are considered in the monographic note to *Hamby v. Samson*, 67 Am. St. Rep. 288-299. A dog is property, for the wrongful killing of which an action will lie: *Chapman v. Decrow*, 93 Me. 378, 74 Am. St. Rep. 357, 45 Atl. 295; *Hodges v. Causey*, 77 Miss. 353, 78 Am. St. Rep. 525, 26 South. 945.

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WOFFORD v. MEEKS.

[129 Ala. 349, 30 South. 625.]

LIBEL—INNUENDO.—IN DETERMINING WHETHER A PUBLICATION IS LIBELOUS PER SE, the court is confined to the language employed in the publication, and cannot look to the innuendo alleged in the complaint. (p. 66.)

LIBEL PER SE—DISHONESTY.—If words employed in an alleged libelous publication impute dishonesty or corruption to an individual, they are actionable per se. (p. 67.)

IT IS LIBELOUS TO IMPUTE TO ANYONE HOLDING AN OFFICE that he has been guilty of improper conduct in office, or has been actuated by wicked, corrupt, or selfish motives. (p. 67.)

LIBEL—EDITORS HAVE FULL LIBERTY to criticise the conduct and motives of public men, and measures and policy of government, but the discussion must be fair and legitimate, and must not asperse the character of public men and ascribe to them base and corrupt motives. (p. 67.)

LIBEL—POSITIVE ASSERTION OF A CHARGE IS NOT NECESSARY to constitute a writing libelous, but it may be made in the form of insinuation, allusion, irony, or question. (p. 68.)

LIBEL—OFFICERS.—A PUBLICATION WHICH IMPUTES TO COMMISSIONERS the prostitution of the finances of the county, to the end of awarding contracts to persons of their political faith, and corruption and dishonesty, is libelous per se. (p. 68.)

IF A LIBELOUS PUBLICATION IS DIRECTED AGAINST A PARTICULAR CLASS OF PERSONS, any one of that class may maintain an action upon showing that the words apply especially to him. (p. 69.)

Action to recover damages for the publication of a libel.

W. H. Denson, for the appellant.

Dortch & Martin, contra.

355 TYSON, J. The questions presented for consideration involve the right of the plaintiff to maintain this action. The complaint avers that the plaintiff was a member of the commissioners' court of Etowah county, that the defendants were opposed to him politically, and that the alleged libelous publication was intended and purported to bring him under suspicion, and to cause the opinion and belief to be entertained by his neighbors that he was dishonest, corrupt, and unworthy of trust and confidence, etc.

The first question to be determined is, Was the publication libelous per se? In determining this question we are confined to a construction of the language employed in the publication,

and cannot look to the innuendo alleged in the complaint. That is but the deduction of the pleader from the words used in the publication, and unless his deduction is supported by the language of the publication, the actionable quality is not legally disclosed. For an innuendo serves merely to explain matter already expressed or to point out where there is precedent matter. It may apply to what is already expressed, but cannot add to, enlarge, or change the sense of the words of the publication. It is for the court to say whether the meaning charged by the innuendo can be legally attributed to the language used in the publication, and for the jury to ascertain whether the intent charged be true in fact. If this inquiry is decided by the court adversely to the pleader, "this puts an end to it; for it is not permissible to make proof that the words employed were uttered in the sense or with the meaning imputed to them in the innuendo. That is not the subject of proof": *Gaither v. Advertiser Co.*, 102 Ala. 458, 14 South. 788; *Henderson v. Hale*, 19 Ala. 154.

In the case of *Iron Age Pub. Co. v. Crudup*, 85 Ala. 520, 5 South. 332, this court said: "The definitions of libel, as found in the cases, vary somewhat in phraseology, and are more or less comprehensive, as may be called for by the particular charge involved in the case. Generally, any false and malicious publication, when ³⁵⁶ expressed in printing or writing, or by signs or pictures, is a libel, which charges an offense punishable by indictment, or which tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society. This general definition may be said to include whatever tends to injure the character of an individual or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame or tends to put him without the pale of social intercourse." This quotation clearly recognizes the principle that if the words employed in the alleged libelous publication impute dishonesty or corruption to an individual, they are actionable per se—a principle well established in other jurisdictions: 13 Am. & Eng. Ency. of Law, 295, 296, and note 3.

So, too, it is libelous to impute to anyone holding an office that he has been guilty of improper conduct in office, or has been actuated by wicked, corrupt, or selfish motives; *Newell on Defamation, Libel, and Slander*, 69.

We do not understand from the argument of defendants' counsel that they controvert these propositions. Their con-

tention on the point under consideration is, that the language of the publication is not reasonably susceptible of a construction imputing dishonesty to the commissioners. Their insistence is that the article, when properly construed, is nothing more than a criticism of their conduct in the extravagant administration of the finances of the county. If this insistence is sustained by the language employed, then unquestionably the right of newspapers to discuss questions relating to the welfare, comfort, and happiness of the people, it must be understood that this confers on them no immunity from liability in publishing a libel, other and different from any other person. Editors have full liberty to criticise the conduct and motives of public men and measures and policy of government, but the discussion must be fair and legitimate. If an editor goes out of his way to asperse the character of a public man or set of men, and to ascribe to him or them base and corrupt motives, he does so at his peril, and must prove the truth of his charges, or answer in damages to the party or parties injured: *Davis v. Shepstone*, 11 App. Cas. 187; *Post Pub. Co. v. Hallam*, 59 Fed. ³⁵⁷ 530, and cases there cited; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. Rep. 318, and note, 43 N. W. 431.

This brings us to a construction of the language employed in the publication. In construing it, the scope and meaning of the whole must be considered and interpreted as others would naturally understand it. Positive assertion of a charge is not necessary to constitute a writing libelous; they may be made in the form of insinuation, allusion, irony, or questions, and the matter will be as defamatory as if asserted in positive and direct terms. Taking the words in their ordinary acceptance, if they convey a degrading imputation, however indirect, it is a libel. As was said in *Peake v. Oldham*, 1 Cowp. 275: "When words, from their general import, appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptance and meaning of them": *Rice v. Simmons*, 2 Harr. (Del.) 417, 31 Am. Dec. 766, and authorities cited; cases cited in note 1 on page 378 of 13 American & English Encyclopedia of Law; also text on pages 384, 385. Applying these principles of construction to the publication in hand, the conclusion is irresistible that its language imputed to the commissioners the prostitution of the finances of the county to the end of awarding contracts to

persons of their political faith—an insinuation, to say the least of it, of corruption and dishonesty. For it will hardly be gainsaid that if the commissioners gave preference in awarding contracts to one of their political faith, when his bid exceeded the offer of another, solely because he was of their political faith, that this was corruption—dishonesty—and they were unworthy of the confidence and trust reposed in them as the fiscal agents of the county. Such is the warrantable implication, we think, from the language employed in the publication: *Ivey v. Pioneer Sav. etc. Co.*, 113 Ala. 349, 21 South. 531; *McDonald v. Press Pub. Co.*, 55 Fed. 264; *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 823, 11 S. W. 1158.

The remaining question to be determined is, Was the plaintiff so affected and particularized by the publication that he can maintain this suit? The article makes no reference to the commissioners' court, but ³⁵⁸ is leveled at the commissioners, and is an arraignment of the commissioners of Etowah county. It is, as we have shown, the conduct of these men, as a class it may be, that is assailed. The imputation of corruption and dishonesty is clearly aimed at the individuals who make up and constitute the court, and not at the court as an integral body. The averments of the complaint show that plaintiff was one of the commissioners at the time the contracts were charged in the article to have been made and at the date of its publication. In this class of cases the rule is: "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff": *Odgers' Libel and Slander*, 127.

Mr. Freeman, in his note to case of *Jones v. State*, 70 Am. St. Rep. 756, after reviewing the cases, says: "We apprehend the true rule is that, although the libelous publication is directed against a particular class of persons or a group, yet any one of that class or group may maintain an action upon showing that the words apply especially to him." And, further, he cites the cases approvingly which hold that each of the persons composing the class may maintain the action. We think this the correct doctrine, and it is certainly supported by the great weight of authority: 13 Am. & Eng. Ency. of Law, 392, and note 1; *Hardy v. Williamson*, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874.

But it is said in answer to all this, by appellees' counsel, conceding the publication to be libelous, the plaintiff, as a commissioner, may have voted against the making of the contracts,

and therefore he is not, and cannot be, referred to in the publication. This proposition might be tenable if the complaint admitted the making of the contracts charged to have been corruptly entered into in the publication. But it is absolutely without merit in the face of the averment that the entire publication is "false, untruthful, scandalous, malicious, and defamatory"; and especially is this true where the defendants, by their motion to strike the substantial allegations of the complaint, confess the truth of every material averment thereof.

Reversed and rendered.

Libel—Innuendo.—The office of an innuendo is to explain what has already been expressed, but not to enlarge or change the sense of the previous words: *Bearce v. Bass*, 88 Me. 521, 51 Am. St. Rep. 446, 34 Atl. 411; *Squires v. State*, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147.

Words May be Libelous per se that impute dishonesty: *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54, 71 N. W. 596; *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819, 11 S. W. 1058.

Libel.—A Public Officer is amenable to public criticism without liability for libel when there is probable cause for comment, and no proof of express malice, though the statements published are not true in all respects: *Jackson v. Pittsburgh Times*, 152 Pa. St. 406, 34 Am. St. Rep. 659, 25 Atl. 613. It is libelous per se to impute to a person in his official character any kind of fraud, dishonesty, or misconduct. A charge that a county commissioner was influenced in the discharge of his duties by a pecuniary consideration, and that he willfully sat in judgment in matters in which he was personally interested, is libelous per se: *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819, 11 S. W. 1058. See, further, the monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 349-354; *Squires v. State*, 39 Tex. Cr. Rep. 96, 73 Am. St. Rep. 904, 45 S. W. 147.

A Libel May be in the Form of insinuation, as well as of positive assertion, provided the meaning is plain: *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455. A letter that intimates a suspicion of dishonesty may be a libel: *Hart v. Reed*, 1 B. Mon. 166, 35 Am. Dec. 179.

JESSE FRENCH PIANO AND ORGAN COMPANY v. FORBES.

[129 Ala. 471, 29 South. 683.]

EASEMENT—LOSS BY PRESCRIPTION.—An easement, even if granted by deed, may be lost by nonuser, coupled with a use on the part of the owner of the servient estate adversely for a period of time sufficient, under the statute of limitations, to create the easement in the first instance. (p. 72.)

THE ENGLISH DOCTRINE OF ANCIENT LIGHTS, that one may acquire an easement in the unobstructed passage of light and air, has no sanction in American jurisprudence. (p. 73.)

EASEMENT IN PRIVATE ALLEY.—THE UNINTERRUPTED USE OF SWINGING BLINDS on windows which open into a private alleyway is not such an adverse use of the alleyway as can ripen into a title by prescription. (p. 73.)

AN EASEMENT BY PRESCRIPTION IS CREATED only by a user adverse to the owner of the estate over which the easement is claimed, under a claim of right, exclusive, continuous and uninterrupted, and with the knowledge and acquiescence of the same, for a period equal at least to that prescribed by the statute of limitations for acquiring title to land by adverse possession. (p. 73.)

NO EASEMENT CAN BE ACQUIRED WHEN THE USE IS BY EXPRESS OR IMPLIED PERMISSION. (p. 73.)

EASEMENT.—THE PRESUMPTION OF A GRANT CAN NEVER ARISE where all the circumstances are perfectly consistent with its nonexistence. (p. 73.)

Gunter & Gunter, for the appellants.

Holloway & Holloway and W. L. Martin, contra.

475 DOWDELL, J. The complainant, a body corporate, seeks by its bill to enjoin the respondent from obstructing and preventing its enjoyment and use of an alleged easement which it claims in a certain private alleyway over the respondent's premises. To the original bill, and bill as amended, the defendant filed a sworn answer denying the allegations as to complainant's claim or right over said alley, and moved to dissolve the temporary injunction which had been granted. The cause was heard on the bill and amended bill, the sworn answer of the defendant, and, without objection from either party, on affidavits being filed on behalf of complainant and respondent respectively. On the hearing, the chancellor rendered a decree dissolving the temporary injunction, and from this decree the present appeal is prosecuted.

The complainant predicates its claim upon a title by prescription, growing out of an adverse user by itself and those

under whom it claims, in a private alleyway over defendant's premises for a period of fifty years or more. It is averred in the bill that there is a party-wall between complainant's lot No. 28 and defendant's lot No. 26, both of which front on Dexter avenue in the city of Montgomery, and extends back sixty feet, and that at this point, in the construction of defendant's building, her wall was deflected onto her own lot No. 26, at right angles, a distance of five feet, and was thence built back parallel with complainant's wall and the dividing line between said lots, thus making the alleged ⁴⁷⁶ alleyway of five feet in width. The complainant's building is a two-story structure, with a doorway opening from the lower story into said alley, and four windows below and five above, with swinging blinds eighteen inches in width, attached to each window, also opening into said alley. The defendant has likewise a door and windows opening from her building into the alley. This alley was used as a foot passageway by the occupants of both buildings, by means of which access was had to an alleged public alley in rear of complainant's building, which abutted against defendant's lot, and opened into one of the public streets of the city. It also appears that at the end of the private alley a gateway was built and maintained by the defendant, which opened into the alleged public alley. The use of said private alley as a footway by the occupants of both buildings continued up to the year 1879, when, as it clearly appears from the evidence, the right to its use as a passage was prevented and denied by the defendant to the occupants of lot No. 28, and since that time continuously for more than twenty years, and down to and within a short time before the filing of the present bill, has been used exclusively by defendant and her tenants.

We think that there can be no doubt that under this state of facts, if the complainant or those under whom it claims ever had prior to the year 1879 an easement in said alley by prescription, such right or easement has been lost to the complainant by the twenty years' interruption and denial of its use and enjoyment. Even in case of an easement granted by deed, a nonuser, coupled with a use on the part of the owner of the servient estate adversely for a period of time sufficient to create the easement in the first instance, will destroy the right granted: Washburn on Easements, 551.

But it is contended by the complainant that even if this be true, it still has a prescriptive right in the space or opening made by said alley between the walls for the purpose of air

and light, inasmuch as there has never been, during the period of fifty years and up to a short time before the filing of the bill, any interruption or interference with the user by the complainant ⁴⁷⁷ or those under whom it claims of the swinging blinds to the windows, which is claimed by the complainant to have been such an obstruction and trespass upon the land of the defendant as to call for a protest from the owner, and consequently constituted an adverse claim and user which ripened into a prescriptive title or right. That the English doctrine of ancient lights has no sanction in our jurisprudence is a principle too well settled to admit of controversy: *Ward v. Neal*, 37 Ala. 500, and cases there cited.

But it is, however, contended by appellant that while this may be conceded, the uninterrupted use of the swinging blinds, as described in the bill, for a period sufficient to create a title by prescription implies a covenant of enjoyment of the flow of air and light through the windows. We do not think this contention sound. Were these swinging blinds such as to obstruct the owner of the land in the use of the alley, or in a manner which called for a protest from the owner? We think not. It is conceded by appellant in argument that one window with swinging blinds would not necessarily call for a protest from the owner of the land over which they swung. If not one, why should two or more, when it is not shown that it was hurtful or injurious to the owner of the land? The opening and closing of the blinds for the purpose of letting in or excluding the air and light is but a momentary act. The blinds, when being opened and closed, covered but momentarily only a small part of the space in the alley, and neither the averments of the bill nor the evidence show that they in any wise interrupted or interfered with the owner in a full and free use of the alley, which is shown to have been used as a foot passageway: *Carrig v. Doe*, 14 Gray, 583.

If the user be not exclusive, and not inconsistent with the rights of the owner of the land to its use and enjoyment, the presumption is that such user is permissive rather than adverse. An easement by prescription is created only by an adverse use of the privilege, with the knowledge of the person against whom it is claimed, or by use so open, notorious, visible, and uninterrupted that knowledge will be presumed, and exercised under ⁴⁷⁸ a claim of right adverse to the owner and acquiesced in by him; and such adverse use must exist for a period equal at least to that prescribed by the statute of limi-

tations for acquiring title to land by adverse possession: Jones on Easements, sec. 164. No easement can be acquired when the use is by express or implied permission: Jones on Easements, secs. 179, 180. The user or enjoyment of the right claimed, in order to become an easement by prescription, must have been adverse to the owner of the estate over which the easement is claimed, under a claim of right, exclusive, continuous, and uninterrupted, and with the knowledge and acquiescence of the same: *Steele v. Sullivan*, 70 Ala. 589; 2 Wait's Actions and Defenses, 693. One circumstance always considered is, whether the user is against the interest of the party suffering it, or injurious to him. There must be an invasion of the party's right, for unless one loses something, the other gains nothing: 2 Wait's Actions and Defenses, 694; *Rountree v. Brantley*, 34 Ala. 544, 552, 73 Am. Dec. 470; *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 305. The presumption of a grant can never rise where all the circumstances are perfectly consistent with the nonexistence of a grant: *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 305; *Ricard v. Williams*, 7 Wheat. 109.

We think that under all the circumstances, and upon the evidence in this case, in the use of the swinging blinds there was no such adverse use of the alleyway in question as could ripen into a title by prescription. It is more in consonance with right and reason to presume that such user, when it does not appear from the evidence to have been hurtful or injurious to the owner, was permissive. We are of the opinion that the chancellor committed no error in dissolving the injunction.

Let the decree be affirmed.

Tyson, J., dissenting.

An Easement in Light and Air cannot be acquired by prescription in America: See the monographic notes to *Field v. Darling*, 41 Am. St. Rep. 328, 329; *Pierre v. Fernald*, 46 Am. Dec. 582. Consult, also, *Metzger v. Hochrein*, 107 Wis. 267, 81 Am. St. Rep. 841, 83 N. W. 308.

The Adverse Use of an Easement will give title by prescription, if accompanied by the same acts as to length of time, exclusiveness, and acquiescence which are necessary to give title to real estate by adverse possession. It is otherwise, if such facts do not exist: *North Point Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 168. See, also, *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; *Scott v. Moore*, 98 Va. 668, 81 Am. St. Rep. 749, 37 S. E. 342.

JOHNSTON v. PHILADELPHIA MORTGAGE AND TRUST COMPANY.

[129 Ala. 515, 30 South. 15.]

FIXTURES--SEVERANCE.—AN OWNER OF REALTY may, by a proper contract of sale, sever a fixture, thereby converting it into a personal chattel, without at the time physically detaching such fixture from the realty. (p. 75.)

FIXTURE—WRITTEN CONTRACT OF SALE.—IN ORDER TO CONVEY THE LEGAL TITLE to a fixture which is not severed from the realty, the contract must be in writing and be executed with the same formality as a conveyance of the realty. (p. 75.)

FIXTURE--SALE--SUBSEQUENT MORTGAGE.—A verbal sale of a fixture not severed from the realty does not convey title as against a subsequent mortgage. (pp. 75, 76.)

FIXTURES ACTUALLY OR CONSTRUCTIVELY ANNEXED TO THE REALTY PASS BY A CONVEYANCE OR MORTGAGE of the freehold, where there is nothing to indicate a contrary intention. (p. 76.)

TRADE FIXTURES ERECTED BY OWNER.—The rules relating to trade fixtures erected by a tenant have no application to such fixtures when annexed by the owner of the realty. (p. 76.)

APPEAL—INSTRUCTIONS—ERROR WITHOUT INJURY. Where the verdict of a jury is in accordance with the law, and the undisputed facts, no injury can result by the giving of, or the failure to give certain instructions. (p. 76.)

Detinue to recover certain shelves and drawers in a warehouse.

James E. Webb and William H. Graves, for the appellant.

Garrett, Underwood & Thach, contra.

⁵²⁰ DOWDELL, J. It is conceded in argument and the evidence without dispute shows that the shelving and drawers, the subject matter of this suit, were affixed to the building or storehouse by the owner of the house and ⁵²¹ lot, and thereby became a part of the realty. And that said shelving and drawers remained without physical severance or change from the time when so affixed by the owner down to the commencement of this suit. The plaintiff bases his right of recovery on a claim of title in the Francis-Vandergriff Shoe Company, a corporation, of which he is the receiver. The alleged title to the Francis-Vandergriff Shoe Company is based upon a verbal contract of sale made by C. H. Francis, the owner of the realty. The defendant derives its title through a mortgage made to it

by the said C. H. Francis conveying the realty. This mortgage was made subsequent to the verbal contract of sale of the fixtures, and at the time of the execution of the mortgage the Francis-Vandergriff Shoe Company was in the possession of the storehouse in which the said shelving and drawers were affixed, as the tenant of the said C. H. Francis, and carrying on a merchandise business in the same. In this manner the Francis-Vandergriff Shoe Company was in possession of the said shelving and drawers, but, as above stated, there had been no physical change or severance of the same from the building, to which they had been affixed by the owner.

The plaintiff's contention is, that a severance was in law effected by the sale of the shelving and drawers by C. H. Francis, and that by said sale these fixtures were converted into personal chattels. We think there can be no doubt of the legal proposition that the owner of the realty may, by proper contract of sale, sever a fixture from the realty, thereby converting it into a personal chattel, without at the time physically detaching such fixture from the realty. But in order to convey the legal title to a fixture, when there has been no actual severance or physical detachment, and as long as it remains affixed to the realty, the contract must be in writing and be executed with the same formality as a conveyance of the realty, since in law the fixture is a part of the realty. The sale by C. H. Francis to the partnership of Francis & Co. under and through which the Francis-Vandergriff Shoe Company claimed title, not being in writing, the legal title did not pass by said sale ⁵²² out of said C. H. Francis. The legal title, being in him at the date of the execution of the mortgage to the defendant conveying the freehold, passed by said mortgage conveyance to the defendant. "The general rule undoubtedly is, that all fixtures, whether actually or constructively annexed to the realty, pass by a conveyance or mortgage of the freehold, where there is nothing to indicate a contrary intention": Ewell on Fixtures, c. 9, p. 275, and many authorities cited in the notes.

It is conceded that the fixtures in question were affixed to the realty by the owner, and it is clearly shown by the evidence that they were placed in the building to more perfectly complete the building for the purpose for which it was erected, viz., of carrying on a merchandise business in the same by the owner. The facts are materially different from the facts in the case of *Broadus v. Smith*, 121 Ala. 335, 77 Am. St. Rep.

61, 26 South. 34, and other authorities cited by appellant in his brief. The question of trade fixtures with the right of removal of the same upon the termination of the lease or tenancy does not arise in this case, and the authorities cited on that subject are without application here. On the undisputed evidence in this case the legal title to the shelving and drawers was in the defendant, and the court might very properly have given the affirmative charge to find for the defendant.

As the verdict of the jury in favor of the defendant was in accordance with the law and the facts, no injury resulted to the plaintiff in the refusal of the charges requested by him, nor in giving of the charges requested by the defendant: *Bienville Water Co. v. City of Mobile*, 125 Ala. 178, 27 South. 781; *Glass v. Mayer*, 124 Ala. 332, 26 South. 890; *Seymour v. Farquhar*, 93 Ala. 292, 8 South. 466; *Pritchett v. Pollock*, 82 Ala. 169, 2 South. 735.

We find no reversible error in the record, and the judgment of the city court will be affirmed.

Trade Fixtures, as between landlord and tenant, are the personal property of the latter, and may be removed by him if the removal can be effected without material injury to the freehold. The general rule that whatever is annexed to the freehold becomes a part of it has this exception: See the monographic note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 883, 884.

Fixtures—Severance.—The owner of the freehold may agree that a fixture shall be severed and belong to another, and after the agreement the fixture is deemed personalty: *Foster v. Mabe*, 4 Ala. 462, 37 Am. Dec. 749; *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505; *Tyson v. Post*, 108 N. Y. 217, 2 Am. St. Rep. 409, 15 N. E. 316.

Fixtures.—An Agreement between the parties whereby an article affixed to the freehold is to retain its character as personalty may rest in parol: See the monographic note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 878.

COMER v. SHEHEE.

[129 Ala. 588, 30 South. 95.]

ADVANCEMENTS—PAYMENT OF.—HEIRS OF AN INTESTATE may sue another heir to have the share of the latter in the lands of the intestate subjected to the payment of advancements made to him, and to have the lien of a creditor, acquired by the levy of an attachment upon the undivided interest of such heir in the lands, declared subordinate to their equity. (p. 78.)

ADVANCEMENTS—JOINDER OF ACTIONS.—IN A SUIT FOR PARTITION, the court may entertain and settle equities growing out of advancements. (p. 79.)

ADVANCEMENTS—PARTITION—JOINDER OF ACTIONS. IN A SUIT TO SUBJECT THE INTEREST OF AN HEIR in the lands of an intestate to the payment of advancements made to him, the court may make a partition of such lands, or order a sale of them, and divide the proceeds equitably among those entitled to them. (p. 79.)

ADVANCEMENTS—CREDITORS OF HEIR.—A PROBATE DECREE ascertaining that an advancement was made to an heir, and the amount thereof, is binding on the creditors of such heir. (p. 79.)

FRAUDULENT CONVEYANCES. — A JUDGMENT AGAINST A GRANTOR in a fraudulent conveyance is, in the absence of fraud, conclusive evidence of the debt, in favor of the creditor, as against the fraudulent grantee. (p. 79.)

ADVANCEMENTS—INTEREST.—An heir to whom advancements have been made cannot be charged with interest thereon. (p. 80.)

G. L. Comer, for the appellant.

T. S. Frazier and Ernest L. Blue, contra.

594 TYSON, J. It is manifest from the allegations of the original bill that its purpose was to enforce the equity of the complainants, who are children or descendants of children of the intestate, to have the share or portion of William G. Shehee, as heir at law, in the lands of the intestate subjected to the payment of advancements made to him, and to have the lien of Comer, acquired by the levy of his attachment upon William Shehee's interest in these lands, declared subordinate to their equity. And it cannot be doubted that this right is of equitable cognizance: *Streety v. McCurdy*, 104 Ala. 502, 16 South. 686.

The amendments to the bill simply eliminated the widow of the intestate, who is shown to have had her dower in the lands assigned, as a party complainant, and sought to have them sold for partition, and the proceeds distributed among those

entitled thereto, averring in this respect that the interest of William Shehee in the lands will be found to be worth only a small amount, if any, more than the advancement made by the intestate to him, and said sum, if found to exist at all, is all that is subject to the claim of his creditor, Comer.

595 A motion was made by Comer to strike these amendments on the ground that they presented a new and entirely different cause of action from the one sought to be enforced by the original bill.

This court, in *Marshall v. Marshall*, 86 Ala. 383, 5 South. 475, and *Booth v. Foster*, 111 Ala. 312, 20 South. 356, 56 Am. St. Rep. 52, held that upon bill filed for partition, the court would entertain and settle equities growing out of advancements. We can see no good reason why the converse of the proposition is not sound. Here the court having taken jurisdiction for the purpose of subjecting the interest in the intestate's lands as a tenant in common or joint tenant with the complainants by descent, of an heir at law, it is no departure to order a sale of the lands for partition, and to divide the proceeds equitably among those entitled to them. Indeed, it may be said, in view of the fact that the lands cannot be equitably divided, and, therefore, as William Shehee's share is incapable, equitably, of being separated from the other five-sixths interest, that it is entirely proper that the whole should be sold, and that the court distribute the proceeds, subject to the equity of complainants. The amount of the advancement to William Shehee was fully proven by the decree of the probate court which resulted from a proceeding instituted in that court, for that purpose, and which proceeding was in all respects regular: Code, sec. 1470 et seq.

It may be said that as Comer was not a party to this proceeding, he is not bound by the decree ascertaining that the advancement was, in fact, made, and the amount thereof. The answer to this suggestion is, that he is entitled to subject only such interest in the lands to the payment of his debt, after the advancement has been paid out of them, and that a judicial ascertainment, by a court of competent jurisdiction, of the fact of advancement and the amount thereof, which bound his debtor, binds him. It is, in every respect, analogous to the principle so often recognized by this court that in the absence of fraud a judgment against a grantor in a fraudulent conveyance is conclusive evidence of the debt, in favor of the creditor, as against the alleged fraudulent grantee: *Yeend v.*

Weeks, 104 Ala. 331, 16 South. 165, and cases cited. There was, therefore, no necessity for proof of the advancement, ⁵⁹⁸ or the amount thereof, by evidence aliunde and none could be made which would, in any wise, vary or alter the recitals of the decree ascertaining such advancement. The decree affords all the data necessary to correct ascertainment of the balance that should be deducted from William Shehee's share of the proceeds of the lands, should his share exceed the amount of the advancement. Of course, should his share of the proceeds not equal the amount of the balance due on the advancement, then no deduction would be necessary, and no surplus would be left to Comer, his creditor.

Doubtless the testimony of Shehee was introduced for the purpose of showing the date of the advancement in order that interest might be charged upon it. And this seems to have been the view that the chancellor took of it. For we find that the register is directed to calculate interest upon the advancement from the date it was made up to the settlement of administration of the estate in the probate court when a distribution of the personal estate was had, and also the interest on any balance remaining after settlement. Advancements do not bear interest: *Krebs v. Krebs*, 35 Ala. 293; *Fennell v. Henry*, 70 Ala. 484; *Caldwell v. Caldwell*, 121 Ala. 598, 25 South. 825. However, as this portion of the decree is interlocutory, being merely a direction to the register, which could be changed at a subsequent term, made for the purpose of carrying out the decree, adjudging that complainants were entitled to have the lands sold for partition, etc., the complainants can take nothing by this appeal.

Affirmed.

Advancements in general are discussed in the monographic note to *Miller's Appeal*, 80 Am. Dec. 559-565. Advancements do not draw interest: *Black v. Whitall*, 9 N. J. Eq. 572, 39 Am. Dec. 423. As incidental to a partition among heirs, a court of equity may adjust and equalize advancements, and an alienation by one of the joint owners does not affect this power: *Booth v. Foster*, 111 Ala. 312, 56 Am. St. Rep. 52, 20 South. 356.

HANEY v. LEGG.

[129 Ala. 619, 30 South. 34.]

A RESULTING TRUST IN FAVOR OF ONE WHO FURNISHES MONEY FOR THE PURCHASE OF LAND, the title to which is taken in the name of another, does not arise, unless the payment is made before or at the time of the purchase. (p. 82.)

RESULTING TRUST.—WHERE A HUSBAND PURCHASES LAND with money which is his wife's separate property, taking title in his own name, a trust arises by operation of law, in favor of the wife, which may be established by parol. (pp. 81, 83.)

RESULTING TRUST.—WHERE A TRUSTEE EMPLOYS THE MONEY OF HIS BENEFICIARY in the purchase of lands, taking title in his own name, the trust which arises originates in the right to pursue the trust fund, and it is immaterial whether the money of the beneficiary is used before or at the time of the purchase, or subsequently thereto. (pp. 82, 83.)

RESULTING TRUST.—IF ANY PORTION OF THE PURCHASE MONEY used in buying land has been paid out of a trust fund, a resulting trust arises in favor of the beneficiary to the extent of the sum so used. (p. 83.)

TRUST—PAROL EVIDENCE.—A TRUST WHICH ARISES BY OPERATION OF LAW is not within the statute of frauds, and may be established by parol. (p. 83.)

LACHES IS FOUNDED ON ACQUIESCENCE in the assertion of adverse rights, and unreasonable delay in not asserting one's own rights to the prejudice of the adverse party. (p. 83.)

A WIFE IS NOT GUILTY OF LACHES IN FAILING TO ASSERT HER RIGHT TO LAND purchased with her money, the title to which stands in her husband's name, where she had no knowledge that the title was in him, and he never asserted any ownership of the land. (p. 84.)

WHEN A TRUST IS IMPOSED BY LAW, THE STATUTE OF LIMITATIONS BEGINS TO RUN in favor of the holder of the legal title against the equitable owner at the time of the conveyance, if there is no recognition of the beneficiary's rights, but if his rights are recognized, then at the time when the holder of the legal title begins to hold adversely. (p. 85.)

W. R. Walker and James E. Houghton, Jr., for the appellant.

W. T. Sanders, contra.

623 TYSON, J. The bill in this cause was filed by Mrs. Haney, who was the wife of the intestate Haney, against the administrator of his estate and his heirs at law, to enforce a resulting trust in a certain piece of land therein described. The bill was amended by the substitution of another, and it is the averments of the latter upon demurrer we are to review on this appeal.

The case as made by the amended bill is this: Complainant and the intestate were intermarried in 1863, and so continued in this relation until his death in 1895. Prior to her marriage she became entitled to certain moneys by inheritance and as legatee which were collected by her husband and used by him in the purchase of this land, in 1866. That she and her husband went into the possession of the land, residing on it with their children until his death, since which time she has been, and is now, in the possession of it. During the entire period of their married life the husband disclaimed any ownership of the land, affirming at all times that it was purchased with her money and was her property. The deed to the land, as shown by a certified copy thereof, made an exhibit to the bill, was executed on the thirteenth day of December, 1876, and was recorded October 15, 1880, and conveys the title to the land to the husband. The complainant avers her ignorance of the fact that her husband had taken the title in his own name, and alleges that this fact did not come to her knowledge until shortly before or just after his death. That as her husband had always declared that the land was hers, and not his, she supposed that the title was in her name.

At the date of the alleged use of complainant's money by her husband in the purchase of the land, it was hers, and not his. He was her trustee, and as such had the right to collect it, and to invest it for her benefit (Code 1852, sec. 1983); and the relation of trustee and cestui ⁶²⁴ que trust continued under our statutory system until the adoption of the act of February 28, 1887: Acts 1886-87, p. 80; Code 1876, sec. 2704 et seq. It is not, however, to be supposed, simply because of the existence of this relation and the use of the money of the cestui que trust by the trustee, where the conveyance taken makes no mention of the trust, that an express trust arises; nor is the principle here involved entirely analogous to the one applicable to cases where no trust relation exists between the parties. As, for example, where A furnishes the funds to B, who purchases and takes title in his own name, instead of in A's. In that class of cases a resulting trust has its origin solely in the facts that the purchase money of land is paid or advanced by one person at the time of the purchase, and the title is taken in the name of another. It is founded on the presumption that he who pays the purchase money intends to become the owner of the land, and, therefore, presupposes the authorized use of the money of him, who asserts the trust, and

is implied independent of any fraud or of any fiduciary relation between the person who pays the money and him in whose name the title is taken, although the mere existence of such relation will not prevent the implication of such a trust. But the presumption of such intent does not arise unless the purchase money was paid before or at the time of the purchase, and hence it is universally held that the trust must have been coeval with the result from the original transaction, or it cannot exist at all. If the payment is not made before or at the time of the purchase, no equity is conferred upon him whose money is used to have a trust of this character declared in his favor: *Preston v. McMillan*, 58 Ala. 84; *Lehman v. Lewis*, 62 Ala. 129; *Tilford v. Torrey*, 53 Ala. 120. Where, however, a trustee, as was the case here, employs the money of his cestui que trust in the purchase of lands, taking title in his own name in violation of his trust, such a trust originates in the right to pursue the trust fund through its various transmutations into a new investment, and it is immaterial whether the money of the cestui que trust was used at ⁶²⁵ the time of or before the purchase or subsequently thereto. If the cestui que trust authorizes the transaction or subsequently ratifies and adopts it, the incidents of the trust, and the facts necessary in law to create it, do not differ in any respect from those of a simple resulting trust: *Thames v. Rembert*, 61 Ala. 340; *Whaley v. Whaley*, 71 Ala. 159; *Long v. King*, 117 Ala. 423, 23 South. 534. It is not indispensable, however, that the whole of the purchase money should have been paid out of the funds belonging to the complainant. If any portion of it was her money, a resulting trust arises in her favor to the extent of the sum so used: *Beadle v. Seat*, 102 Ala. 532, 15 South. 243; *Shelby v. Tardy*, 84 Ala. 327, 4 South. 276; *Anthe v. Heide*, 85 Ala. 236, 4 South. 380.

The equity here sought to be enforced is one which arises by operation of law, and is in no wise dependent upon a contract, and, therefore, not within the influence of the statute of frauds, and may be established by parol: 3 *Brickell's Digest*, p. 785, sec. 47. It arose, as we have said, when complainant's money was used by her husband in purchasing the land, and the deed to him became operative, irrespective of any promise he may have made to have the title made to her. His promise, if one had been made, cannot be enforced, and we do not understand that the bill is predicated upon any such supposed right.

The important questions presented by the demurrers are, Has complainant been guilty of laches in enforcing her equity, and is her right to do so barred by the statute of limitations of twenty years? "Staleness or laches is founded upon acquiescence in the assertion of adverse rights and unreasonable delay on complainant's part in not asserting her own to the prejudice of the adverse party": *Treadwell v. Torbert*, 122 Ala. 300, 25 South. 216; *Montgomery Light etc. Co. v. Lahey*, 121 Ala. 136, 25 South. 1006; *Ashurst v. Peck*, 101 Ala. 499, 14 South. 541; *Shorter v. Smith*, 56 Ala. 208; *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85; 1 *Pomeroy's Equity Jurisprudence*, sec. 419; 12 *Am. & Eng. Ency. of Law*, 533.

Acquiescence involves knowledge, either actual or imputable, of the assertion of an adverse right. If there is no assertion of the adverse right, there can, of course, ⁶²⁶ be no acquiescence. The averment is not only that complainant had no knowledge that the deed to her husband was made to him, but that he never asserted any ownership of the land. On the contrary, he recognized the trust and asserted that the land belonged to her: 15 *Am. & Eng. Ency. of Law*, 2d ed., 1207. They were both in the possession of it and she had the right to rely upon his statement that she was the owner of it, and not he. It cannot be held, in the face of this statement, when weighed in connection with the relation that existed between them, that she was negligent in not inspecting the record of the conveyance for the purpose of ascertaining to whom it was made. Neither can it be held that she omitted or neglected asserting her equity against him, believing as she did, and as she had the right to do, that the title was in her or in him as trustee for her. After lulling her into a sense of security by this statement, it would be unconscionable to permit his representative and heirs at law to take advantage of her inertness in the discovery of the true state of the legal title, and to defeat her in the assertion of her equity within a reasonable time after discovering its existence: 2 *Perry on Trusts*, secs. 861, 867. For the same reason the statute of limitations can avail the respondents nothing. But aside from this, there is no merit in that defense as against the case made by the amended bill. The case of *Brackin v. Newman*, 121 Ala. 311, 26 South. 3, is relied upon by respondents. The facts of that case clearly distinguish it from this. There, the wife knew that the husband had taken the title in his own name, and no recognition by him of her equity was shown. Here, there

was no knowledge by the wife that the title was in her husband, and there was a constant recognition by him of her equity, as well as her possession of the land. Here, no hostile claim was asserted by the husband, but a distinct and unqualified admission by him of her superior right and ownership. Manifestly, on this state of facts, the statute of limitations which is founded upon an adverse, hostile claim of ownership, is no defense: *Robison v. Robison*, 44 Ala. 227; *Nettles v. Nettles*, 67 Ala. 599; ⁶²⁷ *Brunson v. Brooks*, 68 Ala. 248; *Berry v. Wiedman*, 40 W. Va. 41, 52 Am. St. Rep. 866, 20 S. E. 817; 15 Am. & Eng. Ency. of Law, 2d ed., 1207. The principle applicable to this phase of the case is clearly stated in a note in 2 *Perry on Trusts*, fifth edition, to section 865 in this language: "When a trust is imposed by law, as in the case of a resulting trust, the statute begins to run in favor of the holder of the legal title against the equitable owner at the time of the conveyance, if there is no recognition of the cestui's rights; if his rights are recognized, then at the time when the holder of the legal title begins to hold adversely."

The result of the principles we have announced constrains us to reverse the decree sustaining the demurrer and motion to dismiss the amended bill for want of equity and to render a decree here overruling them.

To Constitute a Resulting Trust arising out of a contract of purchase of land, the money of the cestui que trust must be used at the time of the purchase, or enter into the consideration therefor, or must thereafter be applied in pursuance of such purchase: *Moore v. Mustoe*, 47 W. Va. 549, 81 Am. St. Rep. 812, 35 S. E. 871. A subsequent payment will not, by relation, attach as a trust to the original purchase: *Beecher v. Wilson*, 84 Va. 813, 10 Am. St. Rep. 883, 6 S. E. 209. When the purchase price is paid by a husband, and the legal title is taken in the name of his wife, a resulting trust does not ordinarily arise, the presumption being that the conveyance is an advancement. But such presumption may be rebutted: *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235; *Deck v. Tabler*, 41 W. Va. 332, 56 Am. St. Rep. 837, 23 S. E. 721. But a resulting trust in favor of a wife is presumed from the purchase of property by her husband with her money and the taking of title in his name: *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 313, 51 N. E. 835; *Berry v. Wiedman*, 40 W. Va. 36, 52 Am. St. Rep. 866, 20 S. E. 817. See *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405; *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 313, 51 N. E. 835, as to when a married woman is not barred by laches or estopped to assert her rights under a resulting trust.

Estoppel Against Married Woman to assert title to their real property is discussed in the monographic note to *Trimble v. State*, 57 Am. St. Rep. 170-175.

WILSON v. STEVENS.

[129 Ala. 630, 29 South. 678.]

SUBSEQUENT CREDITORS CANNOT COMPLAIN OF A DISPOSITION OF PROPERTY BY A CORPORATION, unless such disposition was made with intent to hinder, delay, or defraud them, and actually had that effect. (p. 87.)

DIRECTORS OF A CORPORATION MAY BE LIABLE TO STOCKHOLDERS for mismanagement of the business, or waste of corporate assets. (p. 87.)

DIRECTORS OF A CORPORATION ARE NOT LIABLE TO ITS CREDITORS merely because they have mismanaged and wasted assets, but only when there has been actual fraud. (p. 87.)

AN INSOLVENT CORPORATION MAY DISPOSE OF ITS PROPERTY THE SAME AS AN INSOLVENT INDIVIDUAL; hence a preference which is proper in the case of an individual is not illegal in the case of a corporation. (p. 87.)

ADMINISTRATORS—LOAN BY—LIABILITY OF BORROWER.—In the absence of fraud and collusion, one who borrows from an administrator money belonging to his intestate's estate, although such loan is made without an order of court, will not be treated as a trustee and held to an accounting at the instance of the beneficiaries. (p. 87.)

ADMINISTRATORS—UNAUTHORIZED LOAN.—A BENEFICIARY OF A DECEDENT'S ESTATE MAY ADOPT an unauthorized contract made by the administrator, or he may repudiate it and hold the administrator liable. (p. 87.)

ADMINISTRATOR'S CONTRACTS—ADOPTION.—AN ADMINISTRATOR DE BONIS NON who with full knowledge of all the facts elects to adopt an unauthorized loan made by a prior administrator, is bound thereby. He cannot accept the investment and also treat the loan as a devastavit. (p. 87.)

D. D. Shelby and James H. Branch, for the appellants.

R. W. Walker, contra.

635 DOWDELL, J. The purpose of the bill in this case is to hold the directors individually liable for the debt of the corporation. Charles H. Crawford, as administrator of the estate of Arthur Owen Wilson, deceased, loaned five thousand dollars, money belonging to the estate of his said intestate, to the North Alabama Improvement Company, a corporation, taking that company's note for the amount of the loan, secured by a mortgage of the company on certain real estate. Crawford having resigned as administrator, the appellant, Elizabeth Owen Wilson, was appointed administratrix de bonis non, and as such administratrix recovered judgment against said company on the note, and foreclosed the mortgage, herself becom-

ing the purchaser at the mortgage sale. The amount of the debt not being realized from said company, the present bill was filed, seeking ⁶³⁶ to charge the individual defendants, who were directors of the North Alabama Improvement Company, with said indebtedness of said company. On a hearing on the pleadings and proof, the bill was dismissed by the chancellor.

The frame of the bill is that of a common creditors' bill filed on behalf of the complainant and such other creditors as might come in and make themselves parties. And, as such, it is wholly inconsistent with the other theory insisted on by the complainant—that is, of holding the defendants liable as trustees in invitum, for dealing with trust funds of the estate of complainant's intestate in participating in the transaction of the alleged unauthorized loan by the administrator in chief to the corporation. It is too plain to admit of controversy that other creditors having no interest in such trust fund cannot base any claim for relief on this theory of the bill.

When considered as a common creditors' bill, pretermittting consideration of the sufficiency of the allegations, the great weight of the testimony repels the theory of fraud, and in this respect we concur in the finding and conclusion of the chancellor that the proof fails to sustain the charges of fraud and collusion. Most of the transactions complained of in the bill were had and done before the debt to Wilson's administrator in chief was contracted. A subsequent creditor cannot complain of a disposition of its property by a corporation, unless such disposition was made with intent to hinder, delay, or defraud subsequent creditors, and actually had that operation and effect: *Graham v. La Crosse etc. R. R. Co.*, 102 U. S. 148; *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649, 7 Sup. Ct. Rep. 741; *Dickson v. McLarney*, 97 Ala. 388, 12 South. 398; *Rollins v. Shaver Wagon Co.*, 80 Iowa, 380, 20 Am. St. Rep. 434, 45 N. W. 1037; *Shreyer v. Scott*, 134 U. S. 405, 10 Sup. Ct. Rep. 579; 2 *Morawetz on Corporations*, secs. 795-800. And the burden is upon the complainant to allege and prove such fraud: *Yeend v. Weeks*, 104 Ala. 339, 53 Am. St. Rep. 50, 16 South. 165. Nor does a creditor, existing or subsequent, occupy such relation to a corporation's directors as its stockholders. Directors may be liable to stockholders for mismanagement of the business ⁶³⁷ of the corporation, or waste of its assets. Not so as to its creditors. A creditor must show actual fraud, in order to hold directors liable;

O'Connor Min. etc. Co. v. Coosa Fur Co., 95 Ala. 618, 36 Am. St. Rep. 251, 10 South. 290. And as to grounds upon which directors may be charged personally with the debts of the corporation, see, also, 3 Thompson on Corporations, secs. 4092, 4137, 4138, 4144, 4145. They are not so chargeable merely because they have mismanaged and wasted assets, but only on some such ground as deceit or fraudulent misrepresentations practiced upon persons dealing with the corporation. It does not appear from either allegations or proof in this case that any fraud was committed by either of the defendant directors on the administration in chief. There was no concealment or misrepresentation, and it appears that Crawford was as fully informed of the situation as any of the defendants: Cleveland v. Smith, 132 U. S. 318, 10 Sup. Ct. Rep. 100.

It was decided by this court in the case of Corey v. Wadsworth, 118 Ala. 488, 25 South. 503, that an insolvent corporation may dispose of its property just as an insolvent individual could, and consequently a preference, which would not be illegal in case of an individual, would not be illegal in case of a corporation: See, also, O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 54 Am. St. Rep. 31, 17 South. 525.

In the absence of fraud and collusion, one who borrows from an administrator money belonging to the estate of his intestate, although such loan be made without an order of court, will not be treated as a trustee in invitum, and held to an accounting at the instance of the cestui que trustent. In such a case the cestui que trust may adopt the contract, or he may repudiate the same and hold the administrator liable. The proof in the present case failed to show any fraud and collusion on the part of the defendants in connection with said loan.

Even if the complainant, as administratrix de bonis non, had the right to repudiate the loan made by Crawford, yet, with full knowledge of all the facts, she elected to adopt the contract, and, having made that election, she is bound by it. She could not accept the investment and also treat the loan as a devastavit: Waring v. ⁶³⁸ Lewis, 53 Ala. 632, 633. This principle was recognized in the opinion on application for rehearing in Lee v. Lee, 67 Ala. 424. See, also, Elliot v. Branch Bank, 20 Ala. 346; Firemen's Ins. Co. v. Cochran, 27 Ala. 236.

The chancellor committed no error in the final decree rendered, and the same must be affirmed.

Corporations may Prefer Certain Creditors to others: First Nat. Bank v. Dovetail Body etc. Co., 143 Ind. 550, 52 Am. St. Rep. 435, 40 N. E. 810; Schufeldt v. Smith, 131 Mo. 280, 52 Am. St. Rep. 628, 31 S. W. 1039; Ford v. Hill, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115; O'Bear Jewelry Co. v. Volfer, 106 Ala. 205, 54 Am. St. Rep. 31, 17 South. 525; Butler v. Harrison Land etc. Co., 139 Mo. 467, 61 Am. St. Rep. 464, 41 S. W. 234; Ames v. Heslet, 19 Mont. 188, 61 Am. St. Rep. 496, 47 Pac. 805; monographic note to Buck v. Ross, 57 Am. St. Rep. 76; Nelson v. Leiter, 190 Ill. 414, 83 Am. St. Rep. 142, 60 N. E. 851. But see Adams etc. Co. v. Deyette, 8 S. Dak. 119, 59 Am. St. Rep. 751, 65 N. W. 471; Hill v. Pioneer Lumber Co., 113 N. C. 173, 37 Am. St. Rep. 621, 18 S. E. 107; Cook v. Moody, 18 Wash. 114, 63 Am. St. Rep. 872, 50 Pac. 1020.

Subsequent Creditors cannot complain of a disposition by their debtor of his property not intended or operating to defraud them: Fullington v. Northwestern Importers' etc. Assn., 48 Minn. 490, 31 Am. St. Rep. 663, 51 N. W. 475; Rollins v. Shaver Wagon etc. Co., 80 Iowa, 380, 20 Am. St. Rep. 427, 45 N. W. 1035; Lander v. Ziehr, 150 Mo. 403, 73 Am. St. Rep. 456, 51 S. W. 742. Compare Ames v. Dorroh, 76 Miss. 187, 71 Am. St. Rep. 522, 23 South. 768; Brundage v. Cheneworth, 101 Iowa, 256, 63 Am. St. Rep. 382, 70 N. W. 211; Gilliland v. Jones, 144 Ind. 662, 55 Am. St. Rep. 210, 43 N. E. 939; note to Hagerman v. Buchanan, 14 Am. St. Rep. 750. They can avoid a transfer of property by their debtor only upon proof of actual fraud against them: Gentry v. Lanneau, 54 S. C. 514, 71 Am. St. Rep. 814, 32 S. E. 523; Cole v. Brown, 114 Mich. 396, 68 Am. St. Rep. 491, 72 N. W. 247.

The Liability of the Directors of a corporation to third persons is considered in the monographic note to Greenbery v. Whitcomb Lumber Co., 48 Am. St. Rep. 913-928. They are not liable to corporate creditors for nonfeasance of duty to the corporation: See the monographic note to Hodges v. New England Screw Co., 53 Am. Dec. 650.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

MURPHY v. CROUSE.

[135 Cal. 14, 66 Pac. 671.]

EXECUTORS AND ADMINISTRATORS—POWERS OF FOREIGN EXECUTORS—SALE OF STOCK.—As against an ancillary administrator with the will annexed, the domiciliary executor appointed in another state has no power to sell and assign stock in a bank located in California, although such stock is regularly in his possession. (p. 92.)

EXECUTORS AND ADMINISTRATORS—POWER TO SELL PERSONALTY.—The common-law rule that title to personalty wherever situated is in the domiciliary executor, who has the absolute right to dispose of it, does not prevail in California. (p. 92.)

EXECUTORS AND ADMINISTRATORS—TITLE TO FOREIGN PERSONALTY.—If an ancillary administrator has been appointed in a foreign jurisdiction, the title to personalty having its situs in such foreign country or state is in the ancillary administrator. (p. 92.)

EXECUTORS AND ADMINISTRATORS.—POWER OF A DOMICILIARY EXECUTOR TO ASSIGN PERSONALTY having its situs in another jurisdiction results from the common-law rule, that such property descends to the personal representative and not to the heir; such rule does not prevail in California. (p. 93.)

ESTATES OF DECEDENTS—SITUS OF CORPORATE STOCK.—Certificates of stock belonging to a decedent for the purpose of administration constitute property belonging to him in the state where the corporation is organized, and it can be reached there, and there only, by his creditors. (p. 94.)

Withington & Carter and J. P. Langhorne, for the appellant.

W. L. Pierce and Lloyd & Wood, for the respondent.

15 TEMPLE, J. This action was brought to compel the corporate defendant to cause to be transferred to plaintiff one hundred and ten shares of its capital stock, which plaintiff

claims to have purchased from the executor of Woodward, who was appointed as such in Minnesota, where the testator was a resident at the time of his death. Woodward died testate, February 3, 1899, and George W. Yates, who was named in the will as executor, was appointed and qualified, March 6, 1899, and appellant was, on the twenty-sixth day of April, 1899, duly appointed administrator with the will annexed, ¹⁶ by the superior court of San Diego county, in this State.

Woodward owned the stock in question at the time of his death, and had in his possession the certificate of his shares. He died in Minnesota, and the certificate passed regularly into the possession of his executor. The plaintiff then was, and still is, president and manager of the defendant corporation, and before his attempted purchase of the shares of stock from Yates was well aware of the appointment of the ancillary administrator, and had caused a dividend upon the stock to be paid to him as such administrator. Indeed, before any propositions had been considered by him in regard to a purchase, he informed Yates or his agent that the sale, if made, must be through Crouse, the California administrator.

In August, 1899, one Naegele, president of the Germania Bank of Minneapolis, wrote to Murphy, the plaintiff, informing him that he had one hundred and ten shares of stock to sell, and inquiring as to price. Further correspondence took place, and on the twenty-eighth day of August, 1899, the plaintiff informed Naegele that the sale must be made through the California administrator, but he would give for the stock two hundred and twenty dollars net. Naegele, on receipt of the letter, wired Murphy to raise offer two points, to cover his commission, and said: "Will close the sale and mail draft stock attached to your bank to-day." Murphy replied: "Accept your offer. Take stock two hundred and twenty-two dollars deliver here." The certificate of stock, with draft, addressed to the bank, arrived about September 5th, when Murphy asked Crouse to consent to the transfer, which Crouse declined to do. On the contrary, Crouse demanded the delivery of the certificate to him and the payment of certain dividends. This demand Murphy, as president, complied with, but against his individual protest that the stock belonged to him.

In the meantime, and before the certificates of stock were turned over to Crouse, Naegele had sent a peremptory order to the bank to return to his bank the certificates of stock or to

pay the draft, and Murphy made a tender of the money to his cashier and demanded the stock, while, as president of the bank, he refused to issue the stock or to accept the money. By taking advantage of the double capacity in which he acted, ¹⁷ it is supposed that Murphy was able to preserve his rights under the assumed contract of sale without risking his money upon the proposition. But if he insisted that he made a purchase, I see no reason why he should not have paid the money. He was not buying the stock from the bank, nor was it made a condition of the sale that the bank would issue the stock. The bank was no further the agent of Naegele than to collect the money, and, upon its payment, to deliver the certificate.

It may be further noted that Yates subsequently repudiated the action of Naegele, and rescinded, so far as he was able, the attempted sale, and the probate court of Hennepin county, Minnesota, formally assigned the matter to the ancillary administrator. I do not regard this order as of any importance.

Assuming that Murphy had a contract of purchase which would be binding upon the domiciliary executor, the case is one of conflict of jurisdictions.

The respondent contends that title to personal property, wherever situated, is in the domiciliary executor, and that he has the absolute right to dispose of the same. This is the common-law doctrine, in pursuance of which it has been said that title to personalty derived from the executor is good the world over. The rule never prevailed in this state. Here both real and personal property descend directly to the heir or to the beneficiary named in the will, with a qualified right in the personal representative, who holds it, for the purposes of administration, more like a receiver than like a common-law executor. The title is not in him, nor has he the power of disposal, save by order of the court.

And even at common law, where an ancillary administrator has been appointed in a foreign jurisdiction, the title to personal property which has its situs in such foreign country is in the ancillary administrator: 13 Am. & Eng. Ency. of Law, 2d ed., 931, note and authorities. This must necessarily be so. There cannot be two independent administrations of the same property, nor could it be tolerated that the domiciliary executor should be able practically to nullify the administration in a foreign country by assigning the personal property there situated.

No case so holds, and certainly none in this state. McCully ¹⁸ v. Cooper, 114 Cal. 258, 55 Am. St. Rep. 66, 46 Pac. 82, is to the contrary. In that case a domiciliary administrator, resident in Indiana, was contending with an ancillary administrator in this state for a certificate of deposit issued by a bank in San Diego to the decedent in his lifetime, he being a resident of Indiana. It was held that, for the purpose of administration, the debt had its situs where the debtor resides, and since administration had been granted in this state, the domiciliary administration could not dispose of the asset. In the opinion the learned commissioner stated seven propositions which, he said, bore "more or less upon the question." The seventh was entirely obiter, and its correctness, as applied to this state is questionable. The power of a domiciliary executor to assign personal property which has its situs in another jurisdiction results from the common-law rule that such assets descend to the personal representative, and not to the heir. That doctrine does not, and never did, prevail here: Beckett v. Selover, 7 Cal. 215, 68 Am. Dec. 237; Haynes v. Meeks, 10 Cal. 120, 70 Am. Dec. 703; Updegraff v. Trask, 18 Cal. 459; Meeks v. Hahn, 20 Cal. 627; Jahns v. Nolting, 29 Cal. 510; Estate of Woodworth, 31 Cal. 619; Chapman v. Hollister, 42 Cal. 463.

The matter was before the court in Brown v. San Francisco Gas Co., 58 Cal. 426. It was there held that a certificate of stock in a California corporation which had been issued to a resident of New York, who died there testate, having in possession the certificate, could be assigned by the executor in the mode authorized by the probate law of that state, and that the assignee could compel a transfer on the books of the corporation here. There was no ancillary administration here. The decision is supported by a line of cases in other states. Whether our peculiar statutes necessitate a different rule in this state was not considered, but, at all events, it was not a decision that such assignment can be made in cases where ancillary administration has been granted in this state.

And this brings us to the principal contention of the respondent. He contends that shares of stock, negotiable notes, and all choses in action, evidenced by writing, have their situs where the owner resides, and when they are in the physical possession of the owner at the time of his death, and pass into the physical possession of the representative, he is the owner, ¹⁹ and may transfer them, and such title will be recognized

everywhere. Such rule is recognized in some states, and, by comity, the personal representative has been allowed to collect debts in a foreign jurisdiction when the debtors pay voluntarily, but he cannot sue as executor in such foreign country. No country will allow a foreign court to exercise its jurisdiction within its borders. Perhaps, by comity, such assignment of a chose in action would be permitted in this state when there is no local administration. But I do not see how an assignment by a foreign executor would be held good here, where we do not admit that the executor himself was vested with title.

It is true, however, that for most purposes a chose in action adheres to the person of the owner, but for the purpose of founding administration this is not true. For such purpose the situs is where the debtor resides. For this exception there are at least two good reasons. It may be necessary to bring an action upon notes to enforce payment, and this a foreign administrator or executor cannot do. As to other personal property, it may be necessary to have the aid of the law for its recovery and protection.

But the main reason, no doubt, why local administration is provided for is for the protection of local creditors and claimants. No state should allow property to be taken from its borders until debts due its own citizens have been satisfied. Our statute provides for administration upon the estate of any nonresident who has died leaving property in this state. To obtain such letters it is not necessary to show that there are creditors or that the property requires care to preserve it. And a mode is provided for ascertaining whether there are creditors. The administration, though called ancillary, to distinguish it from the administration of the last residence of the decedent, is wholly independent of it. Only the surplus remaining after full administration can be remitted to the domiciliary representative for distribution. In other words, our laws provide for the administration of the estates of all nonresidents who have died leaving property here, real or personal, but, as to personalty, the distribution is to be made at, or, at least, according to the law of, the domicile.

The general propositions above stated are supported by numerous cases, among them the following, some of which²⁰ involved the question as to the situs of corporate stock: *McCully v. Cooper*, 114 Cal. 258, 55 Am. St. Rep. 66, 46 Pac. 82; *Wyman v. Halstead*, 109 U. S. 654, 3 Sup. Ct. Rep. 417;

Winter v. London, 99 Ala. 263, 12 South. 438; Luce v. Manchester R. R. Co., 63 N. H. 588, 3 Atl. 618; Kohler v. Knapp, 1 Bradf. Sur. 241. See, also, Story on Conflict of Laws, sec. 512; Minor on Conflict of Laws, sec. 121 et seq.

Respondent also contends that, conceding that choses in action, generally, for the purposes of administration, have their situs where the debtor lives, or, rather, where the obligation created by them is to be enforced, a different rule will apply to certificates of stock. For many purposes, it is said, a certificate of stock is itself a personal chattel or tangible property, and extracts showing this are given from Morawetz and others. Precisely in the same way promissory notes are sometimes regarded as in themselves constituting tangible property, and, indeed, Morawetz, in the extracts given, makes the comparison. A transfer of the certificate transfers the title to the shares, as between the parties. A certificate of stock is, after all, only the evidence of certain contract rights against a corporation, enforceable only, as a rule, where the corporation is. It is evidence of a right to property in this state, which the same legal policy which forbids the removal of other assets of decedents, so long as there may be demands against the former owner unsatisfied, would require to be administered here. Stocks are usually classed as choses in action, but whether they are such or not, they constitute property of a decedent actually in this state, and can be reached here, and here only, by creditors.

Many other points are discussed by counsel, but under the views here expressed it is not necessary to consider them.

This appeal was taken from an order refusing to dissolve a temporary injunction restraining the defendant Crouse from selling and the corporation from transferring on its books the shares of stock in controversy.

For the reasons above given it is ordered that the order be reversed and the injunction dissolved.

McFarland, J., and Henshaw, J., concurred.

Administration—Stock.—For purposes of administration, the situs of a certificate of stock owned by a decedent is in the state where the corporation was organized and has its principal place of business, since it is the situs of the corporation, and not the domicile of the holder of the certificate, that predominates: Grayson v. Robertson, 122 Ala. 330, 82 Am. St. Rep. 80, 25 South. 229. See, also, McCully v. Cooper, 114 Cal. 258, 55 Am. St. Rep. 66, 46 Pac. 82.

Administration—Ancillary and Principal.—For the relative powers and duties of ancillary and principal administrators, see the monographic note to *Goodall v. Marshall*, 35 Am. Dec. 483-490; *Bealey v. Smith*, 158 Mo. 515, 81 Am. St. Rep. 317, 59 S. W. 984.

The Power of Executors over the personal estate of decedents is discussed in the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 179-183. Their powers and duties as to property outside the state are considered in the monographic note to *Shinn's Estate*, 45 Am. St. Rep. 664-674.

ESTATE OF LAKEMEYER.

[135 Cal. 28, 66 Pac. 961.]

WILLS—OLOGRAPHIC, ABBREVIATIONS.—An olographic will, dated "New York, Nov. 22, '97," wholly written and signed by the testator, is properly and legally dated and valid. (p. 96.)

EVIDENCE — JUDICIAL NOTICE — ABBREVIATIONS. — Courts take judicial notice of the meaning of customary abbreviations of common words, including all conventional expressions or arbitrary signs that have passed into common use. (p. 96.)

A. Ruef and G. B. Keane, for the appellant.

C. Westerfeld, for the respondent.

28 SMITH, C. This is an appeal from an order revoking the probate of a will. The appellant is the administrator with the will annexed, John A. Drinkhouse; the respondent, a sister of deceased, Lizzie R. Blizzard, who contested the will.

The will is dated "New York, Nov. 22, '97," and, it is admitted, was wholly written and signed by the testator. The **29** only question in the case is whether the words and figures quoted constitute a date, or, in other words, whether the will was dated, as required by the provisions of section 1277 of the Civil Code.

This question, we think, must be determined in the affirmative. The object of writing is merely to express the thought or intention of the writer; and this may be as effectually done by abbreviations of words or other conventional signs, if commonly used and generally recognized, as by words fully written or spoken. Such abbreviations form, indeed, part of language, and do not differ essentially in their nature from words, which, like them, are themselves merely signs of thoughts. Hence "the courts will determine the meaning of customary abbreviations of common words without proof"; and, especi-

ally—having regard to the present case—they will “take judicial notice of abbreviations ordinarily used to designate time, such as those for the month, forenoon, afternoon, etc.”: 1 Am. & Eng. Ency. of Law, 2d ed., 97-99. And under the head of abbreviations are to be included all conventional expressions or arbitrary signs that have passed into common use, such, for example, as punctuation marks, the Arabic numerals, and other mathematical signs, and similar signs used by merchants, such as the dollar mark (\$), the sign “%,” meaning “per cent,” “c/o,” meaning “care of,” etc.: Abbott’s Law Dictionary, word “Abbreviations”; Webster’s Dictionary, App.; 1 Am. & Eng. Ency. of Law, 2d ed., 98; *People v. Empire Gold etc. Min. Co.*, 33 Cal. 174; Code Civ. Proc., sec. 186. This usage is referred to and impliedly accepted in the provision of the code cited, where it is provided that “such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals, in the customary manner,” which is to be understood, therefore, as simply applying to judicial proceedings a rule elsewhere universal. The rule is in fact but a deduction from the fundamental principle of interpretation, that contracts and wills are to be interpreted according to the intention of the party or parties: Civ. Code, secs. 1317, 1636; Code Civ. Proc., sec. 1856, which equally applies to olographic wills as to others; *Estate of Stratton*, 112 Cal. 516, 44 Pac. 1028; *Mitchell v. Donohue*, 100 Cal. 202, 208, 209, 38 Am. St. Rep. 279, 34 Pac. 614.

³⁰ In this case the expression under consideration is entirely unambiguous, and to everyone familiar with the usage of the language it expresses the month, day, and year as clearly as though these had been written out in full. It is, or, rather, during the century just expired it was, the common usage—universally understood—to designate the year by the last two figures of its number, omitting the figures designating the century; and in writing, the same usage is observed, with the addition that sometimes a dash, or (as in *Estate of Behrens*, 130 Cal. 416, 62 Pac. 603) a comma, or (as in this case) a slanting line is used to denote the omission. In the cases cited by the respondent’s counsel (*Estate of Billings*, 64 Cal. 427, 1 Pac 701; *Succession of Robertson*, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 South. 586) it was otherwise. There, omitting the printed matter, all that was left to designate the year was the last figure of the number—that is, the num-

ber of the year in the decade, without designating the decade of the century—thus leaving the year “to mere conjecture.”

We advise that the order appealed from be reversed and the cause remanded, with directions to the lower court to dismiss the appellant's contest of the will.

Cooper, C., and Haynes, C., concurred.

For the reasons given in the foregoing opinion the order appealed from is reversed and the cause remanded, with directions to the lower court to dismiss the appellant's contest of the will. Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

Courts Take Judicial Notice of the meaning of abbreviations that are in common use, and have a well-understood meaning among people in general: *Dages v. Brake*, 125 Mich. 64, 84 Am. St. Rep. 556, 83 N. W. 1039; *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511, 54 N. W. 404; monographic note to *Lanfear v. Mestier*, 89 Am. Dec. 692.

The Essentials of Olographic Wills are considered in *Succession of Robertson*, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 South. 586; *Mitchell v. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. 614; *Succession of Armant*, 43 La. Ann. 310, 26 Am. St. Rep. 183, 9 South. 50; *Pena v. New Orleans*, 13 La. Ann. 86, 71 Am. Dec. 506. Such wills must be dated: *Note to Lagrave v. Merle*, 52 Am. Dec. 592. Figures may be used to express the amount of the legacy: *Succession of Vanhille*, 49 La. Ann. 107, 62 Am. St. Rep. 642, 21 South. 191.

SOHLER v. SOHLER.

[135 Cal. 323, 67 Pac. 282.]

ESTATES OF DECEDENTS—DECREE OF DISTRIBUTION—EQUITABLE RELIEF.—INTRINSIC FRAUD, by which a decree of distribution is obtained by false and perjured evidence upon issues within the case is not such fraud as equity may relieve against by setting aside, or in any manner interfering with, such decree. Extrinsic fraud, however, may form the basis for such relief. (p. 100.)

JUDGMENTS IN PROBATE—EQUITABLE RELIEF—INTRINSIC FRAUD.—If a widow, as executrix under her husband's will, devising property to his children, conspires with her son, who is not the son of the testator, to procure for him a share of such property as one of the testator's children, and files a petition naming such children and alleging that her son is one of them, and obtains a decree that such son is a child of the testator and entitled to a share of his estate without notice to the testator's children of the fraudulent proceeding, except such as they have by reason of the

executrix being their testamentary trustee and guardian, though equity has no jurisdiction to set aside the probate decree, it may compel such son, as trustee for the children of the testator, to make conveyance to them of the share thus obtained by him, or, if a conveyance cannot be had, to account to them for the value thereof. (p. 104.)

JUDGMENTS IN PROBATE—FRAUD—EQUITABLE RELIEF.—If a probate decree is obtained by fraud, equity may declare the person deriving title under it a trustee for the person defrauded. (p. 105.)

T. B. Bond, for the appellants.

T. J. Sheridan and D. Jones, for the respondent.

324 HENSHAW, J. Plaintiffs, by their guardian ad litem, instituted this action to set aside the decree of distribution given in the estate of Xaver Sohler, deceased, or so much of it as distributed one-eighth of the estate to the defendant Paul Reuss, as the son of the deceased. The court sustained a general demurrer to the complaint, and from the judgment which followed plaintiffs appeal.

Upon the appeal the peculiar and somewhat remarkable allegations of the complaint are, of course, to be taken as true. **325** It is alleged that Xaver Sohler died in the county of Lake, testate; that his widow, the defendant Lena Sohler, became executrix under the will; that the will left all of the property to the widow, and the children were pretermitted heirs. The court, therefore, properly held that the widow was entitled to but one-half interest in all the estate of the deceased, and that the children were entitled to equal parts of the other moiety. When the estate was ready for distribution, the executrix petitioned, and setting forth the names of the other children, plaintiffs herein, alleged in the petition that the defendant Paul Reuss was likewise a child of the deceased, and therefore entitled to a one-eighth of his property upon distribution. The notices required by the probate law were given, and the matter came up for hearing upon the twentieth day of December, 1897, upon which day the court made its decree determining heirship and distributing the property, and in so doing decreed that Paul Reuss was a son of the deceased and entitled to one-eighth of the deceased's estate. Distribution was made accordingly. These children were the minor children of the executrix, Lena Sohler, had no actual notice of the proceedings, had no notice nor knowledge of the falsity of the claim set up on behalf of Paul Reuss, and were

not represented at the hearing, excepting as they were represented by the executrix as their trustee, and by the executrix as their mother, in her capacity of natural guardian. That the fact was, and was known to Paul Reuss and to Lena Sohler, but was not known to these plaintiffs, that Paul Reuss was not the son of the deceased, but was the son of Lena Sohler, their mother; that Lena Sohler and Paul Reuss connived and conspired to mislead and deceive the court in the making of its decree, so distributing one-eighth of the property of the estate to Paul Reuss, and to keep plaintiffs in ignorance of their just claims of ownership and of right of distribution to this one-eighth of the estate thus distributed. Following this are the averments of the prompt commencement of the action after the discovery of the fraud, the appointment of the guardian ad litem for that purpose, the fact that the time for appeal from the decree had expired, and that an appeal would be unavailing, because upon the face of the record, which would be brought up on such appeal, no error could be shown. The relief prayed is for the ³²⁶ vacation and annulment of such part of the decree of distribution as distributes one-eighth of the estate of the deceased to Paul Reuss, otherwise Paul Sohler; that the property so distributed to Paul Sohler be declared to be the property of these plaintiffs in equal shares, and that it be distributed to them accordingly.

Respondents, against the sufficiency of the complaint, urged by their demurrer that it is the exclusive province of the court in probate to determine heirship and decree distribution; that the complaint goes no further than to charge intrinsic fraud, in that Paul Reuss succeeded, by false and perjured evidence, in obtaining a favorable decision upon a matter essential to the proceeding, and one in which the court was bound to exercise its judgment, and notwithstanding that the decision was obtained by such evidence, this fact affords no ground for relief in equity. If this were all the complaint discloses, the respondent's contention would be undoubtedly sound; for it is the general rule that intrinsic fraud, fraud by which a decree or judgment is obtained by false evidence upon issues within the case, is not such fraud as equity will relieve against, the theory being that the losing litigant has had his day in court, and that while it must always remain a misfortune that private causes shall be lost by forsworn testimony, yet stronger than this consideration is that which de-

clares it to be the policy of the law to make an end of litigation, and in the nature of things there never could be a final judgment if every judgment was open to avoidance upon the charge that fraudulent evidence had been introduced in its procurement. Therefore, it is the general rule that extrinsic fraud only will form the basis of such relief as is here sought—extrinsic fraud consisting in the failure to give legal notice to the adversary, the prevention of him or his witnesses from attending the trial, and the like.

But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the estate was not alone the trustee of all of the heirs of the estate and of all the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. ³²⁷ As executrix merely, it might be argued that she was a disinterested party, having no concern whatsoever in the question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But as the mother and natural guardian of these plaintiffs, her position was a very different one. She was under the most solemn obligation to protect the legal rights of her infant and dependent offspring. She was under like obligation to disclose to the court, on their behalf and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate; and with peculiar force did this duty press upon her, in view of the fact that during all of this time she was executrix of, and administered upon, the estate through which her children were to derive their property. Such being her position, it is charged that, in violation of this duty, and of the rights of her minor children, she connived with her adult son—not an heir to the estate of the deceased—to procure for him a distributive portion of that estate, and that the conspiracy was carried to a successful termination. Here certainly is a charge of concealment upon the part of the guardian, when she should have spoken in the interest of her wards, and collusion upon the part of the guardian with another not in interest in the estate, to the end that that other might despoil the wards of their

Sidney B. Dockweiler

rightful inheritance. It cannot to this be answered that the probate proceeding upon distribution was not an adversary proceeding. It becomes adversary in every case where there are conflicting claims, and where there be not the most perfect understanding and harmony between the claimants. The moment heirship was set up by the false claimant, Reuss, that moment between him and the rightful heirs an adversary proceeding was at issue, and from that moment it became the duty of the guardian of these minor heirs to see that the fullest presentation of their claims was put before the court. This, by conspiracy with her codefendant, it is asserted she did not do, and it is clear that her fraud in pushing on behalf of Reuss his false claim to heirship and distribution, and in concealing the truth from her own minor children, the ³²⁸ rightful heirs, and in leaving them in ignorance that they were thus to be deprived of their patrimony, was fraud extrinsic to the case, which prevented their being properly represented at the hearing, or from being represented at all.

We conclude, therefore, that the complaint presents a bill for equitable relief. But for what kind of relief? The relief prayed for is, that the court in equity should avoid so much of the decree as distributes the property to Paul Reuss, should decree that the plaintiffs are entitled to that property in equal shares, and should distribute it accordingly. The prayer for such relief derives support from the case of *Baker v. O'Riordan*, 65 Cal. 368, 4 Pac. 232. In that case a married woman, the owner of separate property in San Francisco, died while her husband was at sea. Her sister procured letters of administration upon the estate, and sought and obtained distribution upon a petition that her sister had conveyed the property to her in her lifetime by an unrecorded deed, which was lost. The appearance of the absent husband was falsely entered by an unauthorized attorney. The trial court found all these facts, but withheld relief, and this court declared that the plaintiff was entitled to the relief sought—the setting aside of the decree of distribution. In *Utah (Benson v. Anderson)*, 10 Utah, 135, 37 Pac. 256, the supreme court remanded a cause to the district court, with directions to set aside the decree of distribution made by the probate court, and enter its decree awarding one-half of the estate to plaintiff. What peculiarities may or may not attach to the jurisdiction of the probate court in Utah we are not advised, but in this state the jurisdiction to determine heirship, and to distribute

the assets of an estate, is vested exclusively in the probate court, under proceedings in rem, strictly defined by the statute. It is a matter of gravest doubt, therefore, whether it is within the power of a court of equity in this state to set aside a decree of distribution so given by a court having exclusive jurisdiction of the matter. But even if the power existed, its exercise, or even the danger of its exercise, would have a most disastrous effect upon land titles. The title conferred by a decree of distribution, after regular proceedings in probate has always been justly recognized as a title of high and unimpeachable value, because of the nature of the proceedings and of the exclusive jurisdiction which has been vested in the probate court to pass upon the questions ³²⁹ involved. If such a decree may at any time be vacated in equity, it must result that no title any longer stands secure. Moreover, aside from the question of title, inexplicable confusion in procedure would result. Would the court in equity, in vacating the decree, have the power to substitute one of its own? If so, apart from the consideration of the exclusive jurisdiction vested in the probate court, it would be the substitution of an equitable judgment in personam for the probate judgment in rem—the substitution of a judgment which can never operate upon any but the parties and their privies for a judgment which is binding upon the whole world. But if it be said that the power of the court in equity would be limited to the vacation of the decree remanding the matter to the probate court to frame a new decree, what assurance can there be that, after all this circuitry of action and protracted delay, the decree of the court in probate might not be at variance with the views of the court in equity? Something of the same difficulty was experienced by the English chancery courts on the question of the jurisdiction of wills of personal estates, which there belonged to the ecclesiastical court, the jurisdiction of which latter court was held to be exclusive. Time and again was the attempt made to have equity overthrow the probate of a will procured in the ecclesiastical court by fraud. In *Barnesly v. Powel*, 1 Ves. Sr. 284, the jury returned a verdict against the will which had been admitted to probate, upon the ground that it was forgery, and Lord Chancellor Hardwicke thus spoke: "As to the personal estate, I left it open in the decree, that the plaintiff should be entitled to relief in such manner as was agreeable to equity; because I saw there might be litigation concerning the manner of getting that relief, whether immediately or by

leaving the plaintiff to sue in the ecclesiastical court, both which are thereby taken in, which it would have been improper to have determined before, for if a verdict for the will, that would be out of the case. Undoubtedly, the principle laid down for the defendant is true, that the jurisdiction of wills of personal estate belongs by the constitution to the ecclesiastical court, according to which law it must be tried, notwithstanding the will is found forged by a jury at law by the examination of witnesses, which is sometimes unfortunate, causing different ³³⁰ determinations, as I have known it. Nor can this court help it; but the parties must take their fate, if by the strict rules of law it is so. But I will lay hold of any ground to alter that, nor give way, if I can avoid it, to run the hazard of these different determinations, and to try this will, so solemnly determined by examination of witnesses viva voce, again in the ecclesiastical court upon examination by deposition. Something of what the plaintiff insists on as a method to avoid this fell from me at the hearing; and as to the general objection thereto, of breaking in upon the jurisdiction of the ecclesiastical court, however formerly doubted, it is certainly now settled by the lords in *Kerrich v. Barnsby*, 7 Brown Parl. Cas. 437, that this court cannot set aside a will of personal estate for fraud. And though nothing was said there of forgery, that is stronger; nor will I infringe on what is laid down there, and in *Andrews v. Powys*, 2 Brown Parl. Cas. 504, and in the case of Mr. Hawkins' will. But there is a material difference between this court's taking on them to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the ecclesiastical court by his fraud, not upon the testator, but upon the person disinherited thereby, and claiming after the testator's death against it." It thus became the principle of the English courts of chancery, while permitting the probate to stand, as having no power to set it aside, to decree that the false legatee or wrongful executor was trustee for the rightful claimant. So here we hold that, under our system, the utmost that the court in equity could do, if it finds the facts to be as alleged, would be to decree that the defendant Paul Reuss holds title as trustee of the minor plaintiffs, and compel him to make conveyance and transfer to them accordingly of all that he may have obtained from the estate of the deceased to which they were entitled, or, if a conveyance of specific property may

not be had, then to hold him accountable to the plaintiffs for the value thereof. This we believe to be the limit of the power in equity in dealing with the matter, and it is in accordance with the principle adopted by the English courts, expressed by Pomeroy as follows: "When probate is obtained by fraud, equity may declare the executor or other person ³³¹ deriving title under it a trustee for the party defrauded": Pomeroy's Equity Jurisprudence, sec. 919, and note.

The judgment appealed from is therefore reversed, with directions to the trial court to overrule defendants' demurrer.

McFarland, J., and Temple, J., concurred.

Relief in Equity Against Judgments on the ground of fraud or perjury is considered at length in the notes to *Pico v. Cohn*, 25 Am. St. Rep. 165-171; *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 232-240. That probate decrees may be relieved against, see this last cited note, p. 221; note to *Green v. Creighton*, 48 Am. Dec. 744-751, on the conclusiveness of decrees of distribution and the power of equity to correct or set them aside. It is only for fraud extrinsic or collateral to the matter in issue and tried in an action, and not for fraud in a matter upon which the judgment was rendered, that a court of equity will set aside or annul a judgment for fraud. This principle applies to the decrees and orders of probate courts: *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111, and note, 38 Pac. 49.

EX PARTE MCGUIRE.

[135 Cal. 339, 67 Pac. 327.]

CRIMINAL LAW—CUMULATIVE SENTENCES—HABEAS CORPUS.—If a prisoner serving a term of imprisonment for a misdemeanor is sentenced to the state prison upon conviction of a felony, his imprisonment in the county jail thereafter for the misdemeanor is unlawful, and upon habeas corpus he must be remanded to the custody of the sheriff for imprisonment in the state prison forthwith. (pp. 106, 109.)

HABEAS CORPUS LIES NOT ONLY WHEN THE PRISONER IS ENTITLED TO HIS LIBERTY, but also when he is held by one person when another is entitled to his custody. (p. 107.)

CRIMINAL LAW—CUMULATIVE SENTENCES.—Special statutory power to impose cumulative sentences in two cases only implies the absence of such power in all other cases. (p. 109.)

A. P. Wheelan, S. P. Elias, and W. Rodgers, for the petitioner.

W. J. Herrin, for the respondent.

339 BEATTY, C. J. The return to the writ issued in this case simply confirms the allegations of the petition upon which it was issued, and establishes the following state of facts: On July 3, 1901, the prisoner was convicted of a misdemeanor in the police court of San Francisco, and sentenced to be imprisoned in the county jail for a term of six months. After this term of imprisonment had commenced, on August 2, 1901, the prisoner was arraigned in the superior court of San Francisco upon a charge of burglary, to which he entered a plea of guilty, whereupon he was duly sentenced, September 7, 1901, to be imprisoned in the state prison at Folsom for a term of years. No appeal was taken from this judgment, and no stay of proceedings was ordered or requested, and on the tenth day of September the clerk of the court delivered to the sheriff of San Francisco a certified copy of the judgment, 340 which it was his duty to execute, by delivering the prisoner to the warden of the Folsom prison (Pen. Code, sec. 1216), unless the execution of the judgment for the felony was stayed by the judgment for the misdemeanor—unless, in other words, it was necessary that the prisoner should complete the term of his imprisonment in the county jail before commencing his term of imprisonment in the state prison. The sheriff, acting upon the theory that the term in the county jail must be served out, instead of delivering the prisoner to the warden at Folsom, returned him to the county jail, where, in his character of ex officio jailer of the city and county of San Francisco, he was detaining him, in execution of the police court judgment on the 24th of October, 1891, when this proceeding was commenced. Upon this point there can be no room for doubt. The prisoner was being confined in the county jail at San Francisco more than forty days after he should have been delivered at Folsom under the commitment from the superior court, a delay which would have been entirely inexcusable, except for the advice under which the sheriff was acting, to the effect that he must not remove the prisoner to Folsom until his term of imprisonment in the county jail for the misdemeanor had expired. It was stated at the hearing that the sheriff had not only been so advised, but that it had been so decided in a habeas corpus proceeding in the superior court, where the prisoner had sought relief before making his application to this court. The fact, therefore, that the sheriff in his return sets up both commitments raises no doubt as to the character and purpose of the imprisonment which the

petitioner is undergoing, and the right of the sheriff to the custody of the prisoner for the purpose of delivering him to the warden of the state prison does not relieve his detention in the county jail for another purpose of its unlawful character, if it is true, as the prisoner contends, that it was the duty of the sheriff to take him at once to Folsom, notwithstanding his term in the county jail had not expired. And the fact that the same person (John Lackmann) happens to be the sheriff charged with the duty of executing the judgment of the superior court, and at the same time ex officio county jailer, and, as such, charged with the execution of the police court judgment, ought not to confuse the question to be decided. The case is just the same as it ³⁴¹ would have been if, instead of having been convicted of a felony in San Francisco, the prisoner had been taken to Alameda county and there convicted of a felony pending his term of imprisonment for misdemeanor in San Francisco, and after such conviction and commitment to the state prison, had been returned to San Francisco to serve out his term there, before being delivered to the custody of the warden. In such case, it is plain that the sheriff of San Francisco could not justify his detention of the prisoner in the county jail by setting up the right of the sheriff of Alameda to his custody for the purpose of delivering him at the state prison. And no more can the sheriff, in the case as it is, justify his continued detention of the prisoner in the county jail, unless it is warranted by the commitment from the police court. He, indeed, has never claimed to justify his acts upon any other ground, and what has been said with reference to this point is in answer to the argument advanced here, that since, in one capacity or the other, John Lackmann is entitled to the custody of the prisoner, he must necessarily be remanded, and, therefore, that it is unnecessary for us to decide whether he should be detained in the county jail till the expiration of the term of his imprisonment there, or taken at once to the state prison. It is manifest that the decision of this question cannot be avoided, for if the contention of the prisoner is sound, his imprisonment in the county jail is unlawful, and for that unlawful imprisonment habeas corpus is the proper remedy. It not only lies where the prisoner is entitled to his liberty, but also where he is held by one person when another is entitled to his custody, in which case the court is expressly empowered to deliver him from the unlawful imprisonment by committing him to the custody of the

person who is by law entitled thereto: Pen. Code, sec. 1493. Under this provision of the statute we have the power, and it is our duty, if we think the prisoner should have been taken at once to Folsom, to deliver him from his unlawful imprisonment in the county jail and remand him to the custody of the sheriff for the sole purpose of being at once, and with all convenient expedition, transported to Folsom. For his term of imprisonment only commences to run from the actual date of his delivery there (Pen. Code, sec. 670), and every day that he is unnecessarily detained in the county jail after his commitment ³⁴² is an unlawful addition to the punishment which the law has imposed for his offense. What, then, is the legal right of the prisoner with respect to the place of his confinement? A prisoner, whether confined in the state prison or in the county jail, may be brought before a court for any lawful purpose (Pen. Code, sec. 1567), and, among other purposes, in order that he may be tried for a criminal offense, as this prisoner was. In such case, the proceedings against him are regulated by the same statutory provisions that control the procedure in other trials upon similar charges. In felony cases tried in the superior court—such as that of the prisoner—where the penalty upon conviction is imprisonment in the state prison, it is the duty of the clerk forthwith (unless a stay is ordered) to furnish the sheriff with a certified copy of the judgment as entered in the minutes of the court: Pen. Code, sec. 1213. And it is the duty of the sheriff, upon receiving such copy, to take and deliver the defendant to the warden of the state prison: Pen. Code, sec. 1216. In view of these provisions, it is difficult to see how, if, in the case above supposed, this prisoner had been convicted of a felony in Alameda county, the sheriff of that county could have taken him back to San Francisco to serve out his sentence in the county jail before taking him to the state prison. And if the sheriff of Alameda county could not have returned him to the county jail in San Francisco, neither can the sheriff of San Francisco do the same thing. To a prisoner serving a term of imprisonment for a misdemeanor the consequences of a subsequent conviction of a felony must be the same in whatever county the conviction takes place. The sentence must be certain in itself and in its legal consequences. It cannot be cumulative upon another term of imprisonment when pronounced in the county where the misdemeanor was committed, if it would not be cumulative when pronounced in any other county of the

state. The legality of this imprisonment may therefore be fairly tested by the case supposed, of a subsequent conviction in Alameda county. The superior court of that county, having the power to bring before it a prisoner serving out a sentence for a misdemeanor committed in San Francisco, for the purpose of trying him on a charge of felony committed in Alameda, has necessarily the implied power to proceed to judgment and execution, and if the ordinary course of procedure ³⁴³ upon conviction requires any modification, by reason of the unexpired term of imprisonment for the misdemeanor, it would seem to be the duty of the court to give the necessary directions in its judgment. Unless it does so, the duty of the clerk and the sheriff is plainly prescribed by the statute. In the absence of a stay, the clerk must forthwith deliver to the sheriff the commitment to the state prison, and the sheriff, upon receipt of the commitment, must deliver the prisoner to the warden. He is not warranted by any law in surrendering him to the jailer of San Francisco, to be kept for a term before his delivery to the warden, and there is no law which would warrant the court in giving a direction to that effect. The power of the superior court to impose cumulative sentences was considered in the late case of *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469, where it was held that the power exists only in the two cases defined in sections 105 and 669 of the Penal Code.

The fact that the legislature has conferred a special power to impose cumulative sentences in two cases implies the absence of such power in other cases. And if the court itself in this case could not have made its sentence cumulative, certainly its officer cannot give it that effect.

My conclusion is that the imprisonment of the petitioner in the county jail, in execution of his sentence for the misdemeanor, is unwarranted and illegal, but it does not follow, as he contends, that he should be set at liberty. He is entitled to the benefit of the writ of habeas corpus only so far as necessary to secure him in his legal right to be placed in the proper custody. It is therefore ordered that he be remanded to the custody of the sheriff for the purpose of delivery forthwith to the warden of the state prison.

Van Dyke, J., Temple, J., and Henshaw, J., concurred.

GAROUTTE, J., concurring. I have serious doubts as to the correctness of the conclusion here declared, to the effect that a judgment of a justice's or police court, rendered within

its jurisdiction, convicting a defendant of a misdemeanor, in effect, will be nullified and set aside by a mere judgment of a superior court, rendered thereafter, convicting the same defendant of a felony. It seems to me that the judgment of a ³⁴⁴ police court, rendered within its jurisdiction, has the same effect, force, and dignity as a judgment of a superior court. I concur in the judgment.

Habeas Corpus.—It has been held that an unreasonable delay in executing a sentence will entitle the prisoner to his discharge on habeas corpus. A prisoner should not be released, however, because held under a cumulative sentence, if it is regular: See the monographic note to *Koepke v. Hill*, post, p. 161.

Criminal Law.—On the validity and effect of concurrent and cumulative sentences, see *Ex parte Gafford*, 25 Nev. 101, 83 Am. St. Rep. 568, 57 Pac. 484; *Breton, Petitioner*, 93 Me. 39, 74 Am. St. Rep. 335, 44 Atl. 125; *Petition of McCormick*, 24 Wis. 492, 1 Am. Rep. 197; *State v. Smith*, 5 Day, 175, 5 Am. Dec. 132.

BALL v. TOLMAN.

[135 Cal. 375, 67 Pac. 339.]

STATUTES, PENAL.—EFFECT OF THE REPEAL of a penal statute is to prevent any prosecution, trial, or judgment for any offense committed against it while it was in force, unless there is a saving clause in the repealing act. If it is repealed pending an appeal, and before the final action of the appellate court, the repeal will prevent the affirmance of a conviction. The prosecution must be dismissed, or the judgment reversed. (p. 112.)

JUDGMENTS.—EFFECT OF REPEAL OF PENAL STATUTE before final judgment in an action to enforce a penalty thereunder, and pending a motion for a new trial, is to avoid the judgment and all proceedings thereunder, and the action should then be dismissed. (p. 113.)

JUDGMENTS.—EFFECT OF REPEAL OF PENAL STATUTE.—If a penal statute on which an action is based is repealed before final judgment in the lower court, it has no jurisdiction to proceed further in the case. (p. 113.)

JUDGMENTS.—THE AFFIRMANCE OF A VOID JUDGMENT is also void as are also all proceedings to enforce the affirmed judgment by execution and sale. (p. 113.)

JURISDICTION ONCE ACQUIRED DOES NOT ALWAYS REMAIN, as the court may have authority at one time to proceed, and its authority may afterward be divested by statute. (p. 113.)

M. G. Cobb and E. L. Campbell, for the appellants.

J. M. Lewis, I. F. Chapman, and A. R. Cotton, for the respondent.

377 CHIPMAN, C. Appeal from an order made after the judgment in the superior court had been affirmed by this court on appeal.

The action was to recover a penalty for a violation of the provisions of the act of April 23, 1880, entitled "An act amendatory of an act entitled an act for the better protection of stockholders in corporations," etc., approved March 30, 1874: Stats. 1880, p. 134. The judgment for plaintiff was entered in the trial court on January 9, 1897. Pending motion for a new trial, the penal provisions of the act of 1880 were repealed by act of February 26, 1897: Stats. 1897, p. 39. The motion was denied on April 12, 1897, and the appeal was duly perfected, heard, and determined, and on December 18, 1897, this court affirmed the judgment and order (Ball v. Tolman, 119 Cal. 358, 51 Pac. 546), and remittitur went down January 18, 1898. On January 27, 1898, defendants made application to the trial court for an order perpetually staying all proceedings on said judgment. Neither defendants nor their attorneys had actual knowledge of the passage of said repealing act until attention was called to it in the opinion rendered in this court on appeal December 18, 1897. The trial court denied defendants' said motion for stay of proceedings on March 28, 1898, on the ground that this court had decided that the **378** repealing act came too late to have any effect on said judgment, even if the acts on which the action was based were penal in their nature, and also that this court had determined that said acts were not penal in their character. On April 25, 1898, execution was levied in said action by the sheriff of Alameda county on real property of one of the defendants, situated in that county, in satisfaction of said judgment, and said lands were sold to one of plaintiff's attorneys on July 30, 1898, for the amount of the judgment, interest, and costs, of which return was duly made by said sheriff. Since the said execution sale, to wit, on October 8, 1898, this court has decided in the case of Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821, that the acts of 1874 and 1880 aforesaid were penal in their nature, and that the repealing act of February 26, 1897, was not too late, but had the effect to avoid the judgment in that case. On December 20, 1898, defendants served and filed an affidavit in the superior court of the city and county of San Francisco where said action was tried, setting forth the foregoing uncontradicted facts, and moved the court "to set aside the said sheriff's sale, . . . and thereupon order a perpetual stay of all

proceedings on said judgment; or thereupon order said judgment to be vacated, and all proceedings in the action perpetually stayed; or thereupon to grant such other order in the premises as the case may demand." The court denied the motion.

In the former appeal the repealing act was not cited, and the point as to its effect on the judgment was not raised. Incidentally, this act was referred to in the opinion, but, as was said in the subsequent case of *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821, "the question here under consideration was not then in the mind of the court." In this latter case it was distinctly held that the act of 1880 was essentially penal in its nature, as much so as "if it had provided that the directors should be guilty of a misdemeanor and punished accordingly for a violation of its provisions, rather than providing, as it does, for the mulcting of the directors in damages in the arbitrary amount of one thousand dollars, at the suit of any stockholder of the corporation."

It was also held that "no person has a vested right in an unenforced penalty"; and it was further said: "The amendment of the statute here under consideration absolutely prevents ³⁷⁹ any further prosecution of this litigation." In that case, as in this, the judgment of the lower court was entered before the repealing act was passed, and was still pending on appeal. Doubtless, if the point decided in *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821, had been raised here on the first appeal of the present case, the result would have been the same as in *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821. But it was not suggested in the briefs nor in the petition for a hearing in Bank.

Respondent contends that this court had jurisdiction to determine that the judgment of the superior court was valid; that the appeal necessarily involved a construction of the act of 1880, after the repealing act was passed, and, therefore, this court had power to affirm the judgment, and it was valid notwithstanding the repealing act. Mr. Sutherland, in his *Statutory Construction* (section 166), states that the effect of the repeal of a penal statute is to prevent any prosecution, trial, or judgment for any offense committed against it while it was in force, unless there is a saving clause in the repealing act, and that if a penal statute is repealed pending an appeal, and before the final action of the appellate court, it will prevent an affirmance of a conviction, and the prosecution must be dis-

missed or the judgment reversed. Numerous cases are cited in support of the text. The same section of this author is cited by respondent, as stating that a final judgment before the repeal is not affected by it. But the judgment of the lower court in the present case was not such final judgment as is referred to above; motion for a new trial was made soon after its entry, and was heard and denied, and an appeal from the order and judgment was taken, and these proceedings occurred after the repealing act was passed: See, also, Freeman on Judgments, sec. 21. It is altogether probable that if this act had been called to the attention of the trial court on the hearing of the motion, and its effect pointed out as held by appellate courts and law-writers, the motion would have been granted and the action on motion would have been dismissed. In *First Nat. Bank v. Henderson*, 101 Cal. 307, 35 Pac. 899, it was said that the repeal "deprives the appellate court of power to render a judgment by which the penalty may be enforced": See, also, *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821. After the repeal of the penalty inflicted by the act of 1880, no further proceedings could be taken to enforce the judgment; execution could not ³⁸⁰ issue, and the sale under it was without authority: Freeman on Void Judicial Sales, sec. 2; Freeman on Executions, sec. 16, note 2.

Conceding, without deciding, that the rule would be otherwise had the case gone to final judgment—i. e., had been affirmed by the court and remittitur had gone down—before the repealing statute was passed, it is quite clear that this court had no power to affirm the judgment, and its act was void, and all proceedings subsequently in its enforcement were without authority. It was held in *Pioneer Land Co. v. Maddux*, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295, that the affirmance of a void judgment upon appeal imparts no validity to the judgment, but is itself void by reason of the nullity of the judgment appealed from. It is true, as respondent suggests, that in that case there was no service of summons, but the principle decided was that there was no jurisdiction in the trial court to render the judgment, and, that being so, its affirmance here could not impart validity to it. So in the present case, when the statute on which the action was based was repealed, there was no jurisdiction in the lower court to further proceed in the case, and its order denying a new trial was not merely erroneous, but it was an assertion of jurisdiction over the case which no longer existed. It, in effect, kept the judgment alive

after the statute was repealed by which alone it could have any validity.

It does not follow that jurisdiction once acquired always remains. A court or judge may have authority at one time to proceed, and his authority may afterward be divested by statute. "In all cases where a court is rendered incompetent to proceed, its proceedings during such incompetency are as invalid as though it had never possessed jurisdiction" (Freeman on Void Sales, sec. 7; Freeman on Judgments, sec. 121); and this incompetency may arise from being deprived of jurisdiction of the subject matter as well as of the person.

The lower court ought to have granted the motion for a new trial, which would have set aside the judgment, and a motion then to dismiss the action would have been in order, and the court should have granted it if made. On the appeal the order should have been reversed, which would have left the case in the same condition as above. As all the proceedings subsequent to the repeal of the statute were without authority, execution ³⁸¹ was without authority, and all proceedings under it were void (Freeman on Judgments, sec. 117), and the court may now vacate the judgment (People v. Greene, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197), and, we think, should have done so.

It is advised that the order be reversed.

Haynes, C., and Cooper, C., concurred.

For the reasons given in the foregoing opinion the order is reversed.

Henshaw, J., Temple, J., McFarland, J.

If a Penal or Criminal Statute is Repealed, without a saving clause, the effect is to obliterate it as completely as though it never had been enacted. All proceedings being prosecuted under it, at whatever stage, must fall. If a statute is repealed after indictment but before trial, no conviction can be had; if after conviction, but before judgment, all authority to pronounce judgment is withdrawn: Note to Wharton v. State, 94 Am. Dec. 218; and if after judgment, but pending appeal, the prosecution must be dismissed or the judgment reversed: Mahoney v. State, 5 Wyo. 520, 63 Am. St. Rep. 64, 42 Pac. 13; Keller v. State, 12 Md. 322, 71 Am. Dec. 596; Wall v. State, 18 Tex. 682, 70 Am. Dec. 302.

LOEWENTHAL v. COONAN.

[135 Cal 381, 67 Pac. 324.]

SURETYSHIP—STATUTE OF LIMITATIONS.—A SURETY'S RIGHT OF ACTION for reimbursement accrues from the time he pays the notes of his principal, and not from their date, and the statute of limitations does not begin to run against such surety until the date of such payments. (p. 116.)

MORTGAGES—SUBSEQUENT DECLARATION OF HOMESTEAD.—A declaration of homestead upon community property by the husband filed after the recording of a deed thereof intended as a mortgage is subject to such mortgage. The exclusion of such declaration from evidence in an action to foreclose the mortgage is not in prejudice of the wife of the homestead declarant. (pp. 116, 117.)

ACTIONS—PLEA OF PRIOR ACTION PENDING—EVIDENCE OF DISMISSAL.—If the defendant pleads a prior action pending, it is not an abuse of discretion to open the case after submission to admit proof that the prior action has been dismissed. (p. 117.)

MORTGAGES—COUNSEL FEE FOR FORECLOSURE.—If a mortgage creates an obligation on the part of the mortgagor to pay a reasonable counsel fee for its foreclosure, but does not provide that such fee shall be secured by the mortgage, it is error to provide in the judgment foreclosing it that such counsel fee shall be a lien upon the mortgaged lands, and to direct its payment out of the proceeds of their sale. (p. 117.)

H. L. Ford and J. S. Burnell, for the appellant.

J. W. Turner, for the respondent.

382 VAN DYKE, J. This action was brought to foreclose four several mortgages alleged to have been given by the defendant J. F. Coonan to the plaintiff, as security or indemnity to the plaintiff by reason of the said plaintiff having signed certain promissory notes as surety for said defendant Coonan. The appellant Mary Coonan and several others were made defendants, on the ground, as alleged in the complaint, that they claimed some interest in the premises covered by the mortgages, but which interest, if any, was subsequent and subject to said mortgages. From the judgment in favor of plaintiff the defendant Mary Coonan appeals.

The principal ground upon which appellant relies for a reversal of the judgment is, that the action is barred by the statute of limitations. The notes on which the plaintiff was a comaker with the defendant J. F. Coonan are dated at different periods, from September 1, 1892, to March 11, 1895, being for different sums, and made payable to different parties. The

court finds that, for the purpose of securing the plaintiff from loss by reason of his signing the said several promissory notes, and as an indemnity against loss therefor, as surety for the said J. F. Coonan, the said J. F. Coonan, between the 8th of March, 1890, and the 10th of May, 1894, executed and delivered to the plaintiff the four several mortgages set out in the complaint, two in the form of mortgages, and two in the form of deeds, but intended as mortgages, by and between the said parties thereto, and as continuing securities, not only for such promissory notes as had been already signed by the plaintiff as surety as aforesaid, but such as plaintiff might thereafter sign at the request of said J. F. Coonan. The court also found that the second mortgage, by an agreement between the plaintiff, as mortgagee, and defendant J. F. Coonan, the mortgagor, was superseded by the third mortgage, bearing date July 8, 1893, in form a deed, but intended as a mortgage, as before stated. A judgment of foreclosure was decreed as to the other three mortgages, to wit, the first, a mortgage in form, and the third ³⁸³ and fourth, in form deeds, but intended as mortgages in fact, as aforesaid. The plaintiff has not appealed, and therefore the second mortgage may be considered as eliminated from the case.

The appellant, in support of the contention as to the statute of limitations, seems to have an entire misconception of the nature of the action. The suit by the plaintiff is not upon the notes. He was a maker, with the defendant J. F. Coonan, of the notes, and they were made payable to other parties. The plaintiff's cause of action springs from the fact, as alleged and found, that about the 28th of August, 1897, he, as surety for the defendant Coonan, paid and took up the notes which he had signed as maker with said defendant. His right of action accrued from the time he paid or took up the notes, and not from the date of the notes, and the statute of limitations would not commence to run as against him until his cause of action accrued. In *Pleasant v. Samuels*, 114 Cal. 34, 45 Pac. 998, in a similar case, it is said: "In the case at bar the action is not brought upon a promissory note to recover against the maker upon the promise which he has made in such note. The cause of action rests upon the fact that the plaintiff was compelled to take up and pay, and did take up and pay, notes which he himself had made for the accommodation of the defendant. The cause of action arose at the time when the plaintiff made such payments of money for the benefit of the defendant":

Wood's Statute of Limitations, 321; Jones on Mortgages, par. 1213; Brandt on Suretyship, sec. 199; 28 Am. & Eng. Ency. of Law, 794; Yule v. Bishop, 133 Cal. 574, 65 Pac. 1094.

The lands and premises involved in the case were the community property of the defendant J. F. Coonan and his wife, the appellant, Mary Coonan, and under the law, as such, were subject to the control of the said defendant J. F. Coonan, by way of mortgage or sale for a consideration. The appellant, however, relies upon a homestead claim covering the northwest quarter of block 64 in the city of Eureka, being a portion of the premises included in the instrument bearing date July 8, 1893, in form a deed, but given as, and understood to be in fact, a mortgage. This deed was duly recorded on the day of its date, whereas the declaration of homestead was not recorded until September 16, 1896. The court, therefore, properly found that all the right and claim of the said appellant, ³⁸⁴ Mary Coonan, were subsequent to and subject to the lien of the mortgages. The exclusion of the declaration of homestead, therefore, could not prejudice the appellant, being subsequent and subject to the mortgage covering the said premises. The findings of fact are supported by the evidence, and it is found by the court that the first mortgage was not satisfied or superseded by the first deed, which was given by way of a mortgage, already referred to, nor were either of said deeds intended as an extinction, novation, or as an accord and satisfaction of the debt or obligation due the plaintiff, growing out of the transaction as surety for defendant J. F. Coonan, as stated. At the close of the trial, plaintiff asked the court, in order to save any question, that the submission be opened to allow him to show by the clerk's register in proper form the dismissal of the action which had been pleaded as pending in reference to the same cause, and it was no error, nor even an abuse of discretion, under the circumstances, for the court to grant the request, and allow the proper proof to be introduced, showing that the action referred to had been dismissed.

While the mortgage which is set forth in the complaint creates an obligation on the part of the mortgagor to pay a reasonable counsel fee for its foreclosure, it does not provide that such counsel fee shall be secured by the mortgage. It was therefore error for the court to provide in its judgment that the amount of the counsel fee allowed to the plaintiff should be a lien upon the mortgaged lands, and to direct its payment

out of the proceeds of their sale under such judgment: *Klokke v. Escailler*, 124 Cal. 297, 56 Pac. 1113.

For this error the cause is remanded to the superior court, with directions to modify its judgment by excluding from the amount for the payment of which the mortgaged lands shall be sold the sum allowed for attorneys' fees, and providing that the amount so allowed shall be entered as a personal judgment against the defendant J. F. Coonan. In all other respects, the judgment is affirmed. The costs of this appeal to be borne by the appellant.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

The Statute of Limitations begins to run against a surety who, having paid the debt of his principal, seeks to recover reimbursement, not from the time when the principal debtor became liable, but only from the time the surety made the payment: See the monographic note to *Scott v. Nichols*, 61 Am. Dec. 504-508; *Hammond v. Myers*, 30 Tex. 375, 94 Am. Dec. 322.

If a Mortgage Provides for Attorneys' Fees, for the mortgagee, upon foreclosure, the same may be allowed by the court: *Abbott v. Stone*, 172 Ill. 634, 64 Am. St. Rep. 60, 50 N. E. 328; *Montague v. Stelts*, 37 S. C. 200, 34 Am. St. Rep. 736, 15 S. E. 968. But there must be an actual foreclosure or sale: *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Boyd v. Jones*, 96 Ala. 305, 38 Am. St. Rep. 100, 11 South. 405. Such a provision in a mortgage is in the nature of a penalty: *Wilson v. Ott*, 173 Pa. St. 253, 51 Am. St. Rep. 767, 34 Atl. 23.

HARRIGAN v. HARRIGAN.

[135 Cal. 397, 67 Pac. 506.]

CONTRACTS—SUBSEQUENT INSANITY.—Contracts or liabilities incurred by persons while sane may be enforced, although the person making the contract or incurring the liability has since become insane. (p. 119.)

DIVORCE—INSANE DEFENDANT.—A divorce may be granted against an insane defendant whose insanity did not exist at the time when the right to a divorce accrued. (p. 119.)

J. F. Peek, for the appellant.

E. N. Rector, for the respondent.

397 COOPER, C. Appeal from the judgment denying plaintiff a divorce.

It appears from the findings that on the ninth day of September, 1894, the defendant willfully deserted the plaintiff, and that such desertion continued for more than one year, when defendant became insane, and was duly committed to the State Hospital for the Insane at Napa, where he has ever since remained. This appeal presents the sole question as to whether or not a divorce can be granted against an insane defendant whose insanity did not exist at the time the right to a divorce accrued. Under our laws, marriage is a civil contract, entered into by competent parties. The right of either party to such marriage to obtain a divorce from the other is given by the code, on the ground, among others, of willful desertion continued for one year: Civ. Code, secs. 92, 107. The plaintiff, therefore, on account of the willful derelictions of defendant, had the right, given her by the statute, before defendant became insane, to procure a dissolution of the bonds of matrimony. Was this right taken away or suspended by reason of defendant's subsequent insanity? In criminal cases, although defendant was sane when the crime was committed, if he becomes insane before or during the trial, the proceedings will be arrested, and no judgment can be pronounced. This is upon ³⁹⁸ the theory that an insane person is incompetent to make his defense. The law in its tender regard for the life and liberty of the subject, and in its mercy, will not pass sentence upon one who is so unfortunate as to have lost his reason, and who is thus unable to establish his innocence. As said by Coke, "A mad man is only punished by his madness." While this is the rule in all civilized countries in regard to prosecutions for crime, it has no application to civil cases. Insane persons are incapable of entering into contracts while suffering under this great calamity. The law throws around them its protecting shield for the reason that, having no mind, they cannot enter into a contract. But in case of all contracts or liabilities incurred by parties while sane, the law affords a remedy, even though the party making such contract, or incurring such liability, has since become insane. This is recognized in the code, which provides for service of summons upon insane persons and for the appointment of a guardian ad litem after such service. We can see no reason why the same rule should not be applied to plaintiff in an action for a divorce where the cause of action accrued during the sanity of defendant. It is true that defendant may not be able, by reason of his insanity, to present some fact or defense known only to

himself while sane. The same reason would apply in any proceeding against an insane defendant on any other contract or liability. If he executed a promissory note while sane, he may be sued upon it while insane. Yet it may be that if sane he could show payment or other valid defense to it. We cannot deny the right of parties to come into the courts to enforce remedies because of such imaginary or fanciful reasons. It is presumed that courts and juries will do their duty. In many cases, where parties are not adjudged insane, by reason of ignorance or want of experienced counsel rights are lost, but the law is not to blame. In the application of the law to the protection of property the enforcement of rights, and the redress of wrongs, it is often an approximation. This by reason of the defect of all human institutions. The law is applied through the medium of judges, who are men of very different understandings and views. This application is upon facts established or disproved by witnesses or other means of evidence provided by law. It is not and cannot be said that the law is an omnipotent rule applied to all ³⁹⁹ transactions in the business of life as if the facts and circumstances were reflected in a mirror and measured by rules of geometry. Therefore, the law, in its wisdom, will not deprive a party forever of the privilege of coming into court for redress, because the party against whom relief is sought has lost his reason. The views herein expressed are sustained by the better reasoned authorities.

In discussing this subject it is said by Nelson, in his work on Divorce and Separation (volume 2, page 669): "But if the insanity is incurable, the plaintiff will not be debarred of her right to a divorce for an act committed while sane."

Bishop, in his work on Divorce and Separation (volume 2, sections 518-522), says: "Divorce being a civil proceeding, and it being established practice in the civil department of our law to maintain suits against insane parties the same as against sane ones, there can be no just ground for excepting divorce causes. Both in reason and authority insanity may excuse an act otherwise unlawful, but where it does not, it is no defense against the injured person's claim for redress. To deny the law's justice to the sane one because of the other's insanity would be to cast in part on the former the burden which God had laid wholly on the latter. Divorce, when there is cause for it, is the plaintiff's right. If the defendant were sane, he could not prevent it; he has no election. Therefore, it is not

otherwise when he is insane. . . . But the doctrine of reason, which, in the absence of a controlling statute, permits the cause to proceed when such hope has fled, appears to be sufficiently sustained by our American authorities."

In *Rathbun v. Rathbun*, 40 How. Pr. 328, the question is extensively discussed. The defendant committed an act of adultery while sane. He afterward became insane, and the wife was permitted to maintain the action against the insane husband. In the opinion it is said: "The plaintiff is entitled to the relief she demands. In this state the relation between husband and wife is established by contract, and the law carefully regulates the rights of each party to the contract. . . . But when the act of adultery was committed prior to the insanity, I am not able to see why the aggrieved party should not have redress."

The same ruling was made by the supreme court of Massachusetts: *Mansfield v. Mansfield*, 13 Mass. 412. See, also, 400 *Douglass v. Douglass*, 31 Iowa, 421; *Stratford v. Stratford*, 92 N. C. 299.

In the English case of *Mordaunt v. Moncreiffe*, L. R. 2 H. L. 374, 41 L. J., N. S. (March, 1872), 42, a different doctrine was first held in the divorce court in analogy to proceedings in criminal cases where the defendant becomes insane. Lady Mordaunt, the defendant, had become insane since the act of adultery complained of. The court ordered a stay of all proceedings until the defendant should recover her mental capacity. Upon appeal to the house of lords, the majority of the consulted judges advised that the case should proceed to judgment, and the lords unanimously sustained this view.

In this case, it does not appear from the findings when defendant became insane, but it is found that the desertion took place September 9, 1894, and that more than one year thereafter defendant became insane and was committed to the hospital. The findings were filed February 26, 1900, more than six years after the desertion. It would seem that there was no undue haste and no probability of defendant's recovery. The learned judge of the court below concluded that the action could not be maintained against defendant "while he is insane." In this view of the law the judge was in error. The judgment should be reversed and the court below directed to enter judgment for plaintiff upon the findings.

Haynes, C., and Gray, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the court below directed to enter judgment for plaintiff upon the findings.

Henshaw, J., Temple, J., McFarland, J.

The Contract of an Insane Person may be enforced, if made while he was of sound mind: See the monographic note to *Flach v. Gottschalk Co.*, 71 Am. St. Rep. 429.

Insane Person—Divorce.—By the weight of authority, a divorce may be prosecuted against the guardian or committee of a lunatic, if the act for which the divorce is sought was committed before the insanity existed: See the monographic note to *Kimball v. Kimball*, 82 Am. Dec. 200. Consult, also, *Sims v. Sims*, 121 N. C. 297, 61 Am. St. Rep. 665, 28 S. E. 407; *Mohler v. Shank*, 93 Iowa, 273, 57 Am. St. Rep. 274, 61 N. W. 981.

SCHAEZLEIN. v. CABANISS.

[135 Cal. 466, 67 Pac. 755.]

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.—While the legislature may require the owners of factories and workshops to put their buildings in proper condition as to sanitation, and may require them to provide reasonable safeguards against danger for the operatives, it cannot delegate the power to determine as to whether and how these things shall be done or not done to the arbitrary decision of any individual or executive officer. Such delegation of power is authority to make a law for the individual, and to enforce special rules of conduct in particular cases, which, being arbitrary, special legislation is unconstitutional and void. (pp. 125, 126.)

O. T. Suden, for the petitioners.

F. V. Meyers, for the respondent.

467 THE COURT. This is certiorari to the police court of the city and county of San Francisco. Petitioners were charged with violating the provisions of "an act to provide for the proper sanitary condition of factories," etc., approved February 6, 1889. That act declares as follows: "If in any factory or workshop any process or work is carried on by which dust, filaments, or injurious gases are generated or produced that are liable to be inhaled by the persons employed therein, and it appears to the commissioner of the bureau of labor statistics that such inhalation could, to a great extent, be prevented by the use of some mechanical contrivance, he shall

direct that such contrivance shall be provided, and within a reasonable time it shall be so provided and used." Section 6 of the act makes it a misdemeanor for any person to violate any of the provisions of the act: Stats. 1889, p. 3.

Petitioners were convicted of having unlawfully refused and neglected, after notice, to provide and use a suction exhauster with properly attached pipes, hoods, etc., in a metal-polishing shop, within a reasonable time after having been directed so to do.

The ultimate question presented for consideration under this writ is that of the constitutionality of the act above quoted.

That the legislature may not delegate its law-making functions, excepting to such agents and mandataries as are recognized by the constitution, is, of course, beyond controversy. Equally we think beyond controversy, however, is the right of the state, in the exercise of its police power, to pass reasonable laws for the protection of the health of employ  s in given vocations, and to make the violation of those laws penal offenses. The limit to which the state may go in this direction is not well defined, but the argument that any such ⁴⁰⁸ legislation is an interference with the right of property—the free right of contract between employer and employ  —has been disposed of and settled by the courts in numerous decisions. Thus says the supreme court of the United States, in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383: "The legislature has also recognized the fact, which experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are to a certain extent conflicting. The former naturally desire to obtain as much labor as possible from their employ  s, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such a case, self-interest is often an unsafe guide, and the legislature may properly interpose its authority." So we have upon the statute books numerous requirements looking to the safety, and even the welfare, of employ  s in different vocations. Protection against the inclemency of the weather for motormen, handrails to stairs, inclosing hoistshafts, automatic doors to elevators, automatic shifters for throwing off belts and pulleys, fire-escapes on buildings, water

supplies in tenement houses, are examples of this class and kind of legislation, which have been pronounced valid by the courts.

In *People v. Smith*, 108 Mich. 527, 62 Am. St. Rep. 715, 66 N. W. 382, it is well said: "The trouble with these cases arises over the inability of the courts to fix a rigid rule by which the validity of such laws may be tested. Each law of the kind involves the questions: 1. Is there a threatened danger? 2. Does the regulation invade a constitutional right? 3. Is the regulation reasonable?" It is no longer in dispute that these laws may be and are upheld as proper exercise of the police powers, when they affect, not the health of the community generally, but the health or welfare of operatives employed in any given vocation. The law is not to be condemned as special legislation because it does not affect all the people, provided it affects the welfare of a portion of the community, or of any indefinite number similarly situated. Therefore, the power of the ⁴⁶⁹ legislature by general law to provide for the proper sanitation of factories, foundries, mills, and the like does not call for discussion. It is no invasion of the right of the employer freely to contract with his employé, to provide by general law that all employers shall furnish a reasonably safe place and reasonably wholesome surroundings for their employés. The difficulty with the present law, however, is that it does not so provide, but that it is an attempt to confer upon a single person the right arbitrarily to determine not only that the sanitary condition of a workshop or factory is not reasonably good, but to say whether, even if reasonably good, in his judgment, its condition could be improved by the use of such appliances as he may designate, and then to make a penal offense of the failure to install such appliances. "The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself": *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. Rep. 1064. Under the law here in question, it matters not how unwholesome, how dangerous, how unsanitary the condition of any factory or workshop may be, the proprietor is guilty of no offense until the commissioner of the bureau of labor statistics has required him to use appliances which the commissioner himself shall designate, and he has refused so to do. Nor does it matter, if the condition of such a workshop be

reasonably wholesome for the uses of the operatives, if "dust, filaments, or injurious gases" are "liable to be inhaled" (and it is here the mere liability, and not the fact, of inhalation which invites the action of the commissioner), and if, in the opinion of the commissioner, such liability to inhalation could "to a great extent" be prevented, he may designate and prescribe the kind of appliance which, in his judgment, is suitable for such purpose, and it must be employed.

But the judgment of the commissioner is not only the determinative factor in the proposition as to whether or not the condition of the factory may be improved "to a great extent," but under this law it is absolutely conclusive and binding upon the question of the appliances to be used, and thus it may result, as to three factories similarly situated, which as to sanitation or the danger from inhalation are in ⁴⁷⁰ precisely the same condition, that the proprietor of one may be guilty of no offense, because he has not been notified by the commissioner to adopt any appliance, the proprietor of the second may be called upon to put into use some appliance at a trifling cost, while the proprietor of the third may have imposed upon him an expense for apparatus amounting to thousands of dollars. In short, arbitrarily and within the declaration, not of the legislature, but of the commissioner, no burden whatever may be imposed upon one institution, while the other, in obedience to this law, may be subjected to a most onerous and even destructive expense. The legislature, as we have said, may require the owners of factories and workshops to put their buildings in proper condition as to sanitation, may require them to provide reasonable safeguards against danger for the operatives, but it may not leave the question as to whether and how these things shall be done or not done to the arbitrary disposition of any individual. By respondent reliance is placed on the case of *Taylor v. Hughes*, 62 Cal. 38. In that case, section 637 of the Penal Code was under review. It provides that every owner of a dam or other obstruction in any running water of this state who, after being ordered and notified by the fish commissioners to construct a fish-ladder, or to repair a fish-ladder already constructed on such dam or other obstruction, according to the plans of the fish commissioners, fails to construct or repair such fish-ladder within thirty days after such notice is guilty of a misdemeanor. The application was for a writ of review, in which was set forth the complaint charging petitioner Taylor with a violation of this statute, and

his conviction thereunder. The decision of this court, embraced in a single sentence, was to the effect that the application did not present grounds for the issuance of the writ. The distinction, however, between that case and the case at bar is broad. The running waters of the state of California are public property. One who obstructs them obstructs them under license or permission from the state, but only upon such conditions as to their use as the state may impose. It is therefore permissible for the state to impose such conditions upon that use as it may see fit, and in this case the requirement was that the person so obstructing the water should build an appliance to permit the free running of the fish up the stream. Here was no ⁴⁷¹ interference with private property; here was merely a condition imposed by the state upon a private individual as to his use of property, the title to which, and the right of fishery in which, remained in the public. The same broad distinction exists between the case at bar and that of *Health Department v. Rector*, 145 N. Y. 32, 45 Am. St. Rep. 579, 39 N. E. 833, also relied upon by respondent. In the latter case, section 663 of the consolidation act of the city of New York required all tenement houses to be supplied with sufficient water on each floor, at one or more places, in sufficient quantity, by the owners, whenever they were directed so to do by the board of health, making it a misdemeanor to fail to comply with the directions of the board. Here the only requirement was that a sufficient quantity of water should be supplied on each floor of the tenement building. To answer this law it was necessary only to show that a sufficient quantity of water was supplied for the health and convenience of the tenants. The direction of the board of health, or its determination that the supply was insufficient, was not conclusive; for, as the court said in sustaining the validity of the law: "The citizen cannot under this act be punished in any way, nor can any penalty be recovered from him for an alleged noncompliance with any of its provisions or with any order of the board of health, without a trial. The punishment or penalty provided for in section 665 cannot be enforced without a trial under due process of law, and upon such trial he has an opportunity to show whatever facts would constitute a defense to the charge."

The manifest objection to this law is, that upon the commissioner has been imposed not the duty to enforce a law of the legislature, but the power to make a law for the individual,

and to enforce such rules of conduct as he may prescribe. It is thus arbitrary, special legislation, and violative of the constitution.

For the foregoing reasons the police court is directed to annul the proceedings touching the trial, conviction, and judgment against petitioner herein.

The Legislature Cannot Delegate to any person or body the power to determine what the law shall be, except when authorized by the constitution: *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241. As to what powers may be delegated to boards of health, see the monographic note to *Blue v. Beach*, 80 Am. St. Rep. 212-234. The fact that the inspector of factories is given a discretion as to the number, location, material, and construction of fire-escapes in buildings, under a statute relating thereto, does not render the statute unconstitutional as delegating legislative power to the inspector: *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851.

The Legislature may Require that in the construction of buildings sanitary conditions shall be observed: See the monographic note to *Blue v. Beach*, 80 Am. St. Rep. 225-227; that certain buildings shall have fire-escapes: *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851; and that employers shall use appliance for the protection of the health of their employes: *People v. Smith*, 108 Mich. 527, 62 Am. St. Rep. 715, 66 N. W. 382.

O'CONNOR v. GOLDEN GATE WOOLEN MANUFACTURING COMPANY.

[135 Cal. 537, 67 Pac. 966.]

MASTER AND SERVANT—MINOR EMPLOYEES—NEGLIGENCE—PROXIMATE CAUSE.—If a minor employé in a factory is assigned the duty of sweeping around a dangerous machine containing cog-wheels, without warning or knowledge of the danger therefrom, the act of a fellow-servant in setting the machinery in motion in the course of his duty, while the minor employé is engaged in such sweeping, is not the proximate cause of an injury to the latter, caused by catching her dress in the cog-wheels, especially when it was usual and necessary to have the machinery in motion while the sweeping was being done. (p. 132.)

MASTER AND SERVANT—MINOR EMPLOYEE—DUTY TO WARN OF DANGER—NEGLIGENCE.—If a master employs a servant to do work of a dangerous character or in a dangerous place, and the servant, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the danger, it is a breach of duty and negligence on the part of the master to expose such servant, even with his own consent, to such danger, unless he first gives him such instructions or cautions as will enable him to comprehend the risk, and do his work safely with the exercise of proper care on his part. (p. 134.)

MASTER AND SERVANT—MINOR EMPLOYÉ'S—CARE REQUIRED OF.—The ordinary care which a minor employé of limited judgment and experience is called upon to exercise in the performance of a certain act within the scope of his duty is not the same quantum of care required of an adult under similar circumstances. Whether such minor employé duly exercised such judgment as he possessed in a given case, taking into consideration his years, experience, and ability, is a question for the jury. (p. 135.)

J. E. Foulds and F. Shay, for the appellant.

Sullivan & Sullivan, for the respondent.

537 CHIPMAN, C. Action for personal injury received by plaintiff in the course of her employment by defendant. The **538** cause was tried before a jury and plaintiff had the verdict, with damages assessed at three hundred dollars. Judgment was accordingly entered, from which and from the order denying motion for a new trial defendant appeals.

At the time of the injury plaintiff was fifteen years and ten months old and in short dresses; she had attended the common schools, and, as testified by her mother, "was as bright and intelligent as other girls of her age; she was neither dull nor stupid." She was employed in defendant's woolen goods factory from August 1, 1899, until September 6, 1899, when she received the injury complained of. Her work was at and about a machine known as a "mule," operated for the purpose of spinning wool, her service being under the direction of one Tilley, foreman for defendant. It was alleged in the complaint that attached to the rear of this machine were certain cog-wheels of a dangerous character, which were uncovered and wholly unprotected by guards or otherwise, and by which said machine was run; plaintiff was required every afternoon by said foreman to sweep the floor of said factory immediately to the rear of the machine and next to said cog-wheels; that this work of sweeping was known by defendant to be hazardous, and that plaintiff had not sufficient or any experience or knowledge to perform said work, and was ignorant of the dangers attending the same, and that defendant carelessly and negligently failed to instruct or warn plaintiff of the dangers or hazards in sweeping said portion of said factory; that on September 6, 1899, in obedience to the direction of said foreman, plaintiff undertook to sweep said floor at the rear of said mule and in and about the vicinity of said cog-wheels, and that by the reason of the "fault, wrong, and negligence of said defendant, and of said assistant foreman

in the premises, as aforesaid, and without any fault or negligence on the part of plaintiff, the dress of plaintiff was caught by said cog-wheels, and the left thigh of plaintiff was drawn and caught by said cog-wheels, and was crushed," causing plaintiff great injury and pain, etc. Defendant in its answer denied the alleged dangerous character of said machinery or said cog-wheels; admitted that the cog-wheels were uncovered, as was customary in such cases, and alleged that no guard was necessary around them; denied that the work of sweeping around the machinery was hazardous or dangerous; alleged that ⁵³⁹ plaintiff "had full experience and knowledge and had been fully instructed how to safely perform said work; . . . that whatever dangers there were, were fully open to her observation, and could have been easily avoided by her by the exercise of ordinary care"; denied that it failed to instruct plaintiff concerning said work, and averred that by its said foreman it "fully and minutely instructed plaintiff in the premises, warned her against all probable or possible dangers, and advised her how to avoid them"; alleged that it was part of plaintiff's duty to sweep around and about said mule daily; that at all times while in defendant's employment plaintiff "was cautioned by defendant's foreman as assistant not to go behind said mule, either to sweep said floor or for any purpose whatever, until she had first stopped the motion of the machine; . . . that said cog-wheels were in plain sight, and that the danger to be apprehended from them while in motion was apparent to plaintiff"; that previous to the day of the injury "it was her custom, pursuant to the instructions given to her as aforesaid, to stop the motion of said machine before she went behind it or in the vicinity of said cog-wheels; that on said day she carelessly and negligently failed to stop the motion of said machine while sweeping said floor in the rear thereof; . . . that whatever injuries she received were the result wholly of her own negligence, and were not due to any act or omission, negligent or otherwise, of defendant, its agents or servants."

The so-called mule was a machine about fifty feet long, and was one of several operated in the same room; they were placed on each side of the room, facing each other, with the rear end of each to the wall, and were operated from the front; the machine moved back and forward on a track by means of cog-wheels connected with a pulley, which was belted to a shaft above, driven by steam power; a lever worked by the

operator shifted the belt so as to give an in-and-out movement of the machine on the track. Each machine had ten or eleven spools, with forty-eight threads to each spool, or about five hundred threads in all. The cog-wheels and pulley were in a compact mass at the rear. Plaintiff's duty was to change the bobbins and splice the threads when they happened to break, and to sweep around the machine. Her post of duty when operating the mule was in front, and it is not pretended that ⁵⁴⁰ there was any danger there. The machine was set close to the wall, the space behind the end of the tracks on which the machine moved in and out being twenty inches; the frame of the machine to which the movable part ran back was twenty-one and one-quarter inches from the wall. The cog-wheels and pulley were but eight and three-eighths inches from the wall, and this cluster of rapidly moving wheels was quite near the floor. Plaintiff was instructed to sweep around the machine and through this narrow passage every day before quitting work. Obviously, there was more or less danger to plaintiff, even in short dresses, in sweeping in this narrow passageway near the cog-wheels and pulley while the machine was in motion. A machinist of many years' experience testified: "The wheels turn in one direction while the machine comes in, and then the pulley is shifted to another wheel, making a reverse, so the machine proceeds outward again. It is unprotected. Immediately to the rear of the cog-wheels is a dangerous and hazardous place to be. A girl ought not to have to go behind there to operate the machine. It is operated from the front. If her duty required her to go near the cog-wheels, she should be warned that it was a very dangerous place to go, that she should not get caught in the cog-wheels." Another machinist of experience testified: "There is one space of twenty-one inches that they may go right into, but a space of eight and one-third inches it would be rather hard for a child to get in. There is nothing that you can say too strong in speaking to any human being about getting into a place like that with live machinery going." This evidence went in without objection, and the witnesses, in reply to questions by defendant's counsel, said the wheels were in plain view, and no one who went behind the machine could help seeing them.

Plaintiff testified that she was employed by Mr. Broad, the superintendent, who turned her over to Mr. Tilley, Sr., the foreman, for instructions. "Mr. Tilley turned me over to his

son, saying, 'My son will show you what to do.' I went with the son to the mule, and he showed me how to piece wool, how to tie the threads when they broke. He also told me that I would have to sweep the floor around the machine, back and front, and in the passageways, every night. He told me that he would sweep that night, and that I should do it afterward, ⁵⁴¹ and that it should be done about five or ten minutes to 6 o'clock. The passageways would have to be swept before leaving at night. That was all he said that afternoon. He said nothing about cog-wheels in the rear of that machine, nor did the foreman or superintendent, either then or any other time, explain to me the fact that any machinery was connected with the mule." She testified that she had never before had "any experience about machinery or the operation of machinery of any kind." Young Tilley, a boy of sixteen years, had worked with her until within two or three days of the accident; when he was there he operated the machine, and when he was away plaintiff worked the lever; on the day she was injured no one worked with her. She testified to the circumstances attending her injury as follows: "The accident happened at about ten minutes to 6 o'clock on the 6th of September, 1899. It was getting late and I was behind in my work; I did not have very good wool that day, and the threads were all breaking; so Miss Hayden, who was on the other mule, and who had a Chinaman with her, and so her work was running good, she said she would help me. We were piecing the wool, and she told me that she would piece it while I would sweep. So, while I went to sweep, I was sweeping behind there, and I just got up to where the machine was, and all of a sudden my dress caught and I was wound in." When she started to sweep the machine was stopped, and Miss Hayden was piecing the wool, but plaintiff testified that she knew the machine was to be started as soon as the wool was pieced and while she was sweeping.

She testified that she had swept behind the "mule" all the time she was there, under young Tilley's direction, and while the machine was in motion; that her hours of labor were from 6:30 A. M. to 6:15 P. M., with forty-five minutes for lunch, and she was paid seventy-five cents per day; that she never had full charge of the machine, but started it and stopped it by the lever whenever her duties required it; that she noticed the passageway behind the machine was narrow, but she never noticed the wheels; she saw the wheels, but did not

notice them particularly; that she did not know what cog wheels were, and had never been told what a cog-wheel was that she had never been told not to sweep behind the machine when it was in motion. On cross-examination she testified "Q. Did you know ⁵⁴² what 'wheel' meant? A. Yes, sir. I knew what 'wheel' meant. Q. You saw those wheels? A. No, sir. I knew there were wheels there, but I did not pay any attention. Q. You knew they were wheels but did not know they were cog-wheels? A. No, sir."

Defendant introduced evidence to the effect that plaintiff was cautioned to be very careful in going around the machinery, but defendant concedes that on this point there is a conflict, and the case stands on review here as though plaintiff had received no instructions as to sweeping behind the machine, was not told of any danger in that part of her work and was not informed as to any danger from these wheels or warned to be careful in sweeping near them.

Under these facts defendant makes two points: 1. That the proximate cause of plaintiff's injury was the negligence of fellow-servant—namely, Miss Hayden—in starting the machine while plaintiff was sweeping; and 2. That the danger to which plaintiff was exposed was plainly apparent—that the machine employed was open and visible in all its parts, its operation unconcealed, and the danger in its use obvious, and it was incumbent upon plaintiff to avoid the danger by the reasonable use of her own faculties—and, further, that no duty of instruction rested on defendant.

1. As to the first point, the evidence does not bring the case within the rule exonerating the master where the proximate cause of the injury is the negligence of a fellow-servant. When Miss Hayden came to plaintiff's assistance it was to help plaintiff catch up in her work and to assist her in piecing the threads, which were breaking more than usual. It was understood by both of them that when Miss Hayden told plaintiff to sweep while she (Miss Hayden) spliced the wool, the machine would be started as soon as the splicing was finished and while plaintiff was sweeping. It was not unusual for her to sweep while the machine was in motion; she had done so frequently while working with young Tilley, from whom she received all the instruction ever given her. There was no negligence on Miss Hayden's part, although it is true if she had not put the machine in motion the accident could not have happened. If there was negligence at all, attributable to

either of these two girls, it must rest with plaintiff alone as between them. The situation was not different when Miss ⁵⁴³ Hayden was operating the machine temporarily from the situation when plaintiff was operating it with Tilley; for she swept behind the machine while it was in motion, under his instructions.

2. The case must be resolved under the second point, and to this counsel for defendant address themselves particularly. Counsel have cited a large number of cases arising in other jurisdictions which it is contended sustain their position—indeed, the brief leaves nothing to be desired in this particular—and they add to the long list of authorities, as supporting their contention, the cases of *Studer v. Southern Pac. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 942, and *Loftis v. Dehail*, 133 Cal. 214, 65 Pac. 379. Respondent relies on *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 306; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; *Tedford v. Los Angeles etc. Co.*, 134 Cal. 76, 66 Pac. 76; and some other cases.

In *Studer v. Southern Pac. Co.*, 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 942, a freight train was rightfully standing, for the time being, across a public street at the station in the town of Cordelia; a child twelve years old, passing along the obstructed street, halted for a few minutes, and as the train did not move, she attempted to cross the train between two cars by climbing over the coupling, and while doing so the train moved without warning and the child was injured by being crushed between the cars, and soon after died. It was held that the child was guilty of contributory negligence. Upon the point as to whether the question of negligence was for the jury, and as to the rule where minors are concerned, the court stated the law with some amplification; and if the law applicable to the circumstances of that case were applicable to the facts appearing in the present case, appellant would find in the opinion much to support its contention. Appellant would interpret the *Studer* case as practically eliminating all distinction between minors and adults, as is also claimed for *Loftis v. Dehail*, 133 Cal. 214, 65 Pac. 379, a case in some respects similar to *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113. But these cases must be considered in the light of the facts to which the rules of law were applied. There is an obvious and palpable distinction to be drawn between this class of cases and those involving the

relation of ⁵⁴⁴ master and servant where the servant is a child, and this distinction is unmistakably recognized in numerous instances by this court: *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 306; *Mullin v. California Horseshoe Co.*, 105 Cal. 77, 38 Pac. 535; *Ryan v. Los Angeles etc. Co.*, 112 Cal. 244, 44 Pac. 471; *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; *Verdelli v. Gray's Harbor Com. Co.*, 115 Cal. 517, 47 Pac. 364. The rule stated in *Jones v. Florence M. Co.*, 66 Wis. 277, 57 Am. Rep. 269, 28 N. W. 207, was quoted approvingly in *Ingerman v. Moore*, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 306, and in *Ryan v. Los Angeles etc. Co.*, 112 Cal. 224, 44 Pac. 471. It is, that if a master employs a servant to do work of a dangerous character, or in a dangerous place, and the servant, "from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely with proper care on his part."

In *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42, it was pointed out that where the ordinary occupation of a minor is the running of a machine, and he "is shown to have knowledge of the working of the machine, its dangers or its defects, and where it further appears that the minor is not of such tender years as to be unable to appreciate the nature of the dangers or defects, . . . he takes upon himself as will an adult under the same circumstances, the perils and risks of his employment. . . . But there is a distinction which, as a matter of humanity as well as law, should be drawn between such cases as those where the minor is put to a task which, while within the range of his employment, is to him, in his inexperience and youth, unusual and strange." Speaking of the claim that the minor had knowledge that the machine was liable to start, and hence he had assumed the risk attending the particular work he was doing as well as the general work, the court said: "We think that as a proposition of law this cannot be said. Were the employé in this case an adult, the rule might well be different; but the very reason why an adult under these circumstances would be held to have taken ⁵⁴⁵ the risk while screwing on the nut serves to show the injustice and hardship which would

result if it were sought to be applied to a minor. The question of the taking of a risk, the question of the assumption of responsibility in a given act, is determined as much upon the matter of judgment as upon the matter of knowledge. An adult employé, when the facts are known to him, is presumed in law to exercise the same judgment as would the employer. The employer's duty is fulfilled, and he is not negligent, if he puts the employé in full possession of the facts and makes him acquainted with the attendant dangers and risks." After showing that even the adult must be put in full possession of the facts, and must be made acquainted with the dangers, in order to relieve the employer, the court said: "The conduct of the child, however, is and should be viewed and measured by a different rule. . . . Knowledge he may have; facts he may acquire; but the ability to apply his knowledge or to reason upon his facts comes to him later in life. . . . It would be barbarous to hold him to the same accountability as is held the adult employé, who is an independent agent. His conduct is to be judged in accordance with the limited knowledge, experience, and judgment which he may possess when called upon to act." Upon the question whether the minor's conduct is to be judged by the jury or as matter of law by the court, it was said: "And it must, from the nature of the case, be a question of fact for the jury, rather than of law for the court, to say whether or not, in the performance of a given task, the child duly exercised such judgment as he possessed, taking into consideration his years, his experience, and his ability. This must necessarily give rise to a different rule from that so well established, which measures the conduct of the adult by that which might be expected of the ordinary prudent person placed in the same position."

Applying these principles, unquestionably sound, as we think them, how stands the present case? The only evidence we have of the knowledge plaintiff possessed of the dangers attending the sweeping around this machinery, or of her knowledge of machinery generally, comes from her. The jury found that she was wholly uninstructed or warned as to the danger when sweeping in the rear of the machine and ⁵⁴⁶ through the very narrow passage furnished. Indeed, it might well be inferred that defendant put her to work under instructions at least implying that there was no danger whatever in sweeping behind the machine, for the failure to warn her might reasonably be taken by her as equivalent to assuring her there

was no danger; and yet the duty of sweeping in this hazardous place was put upon her from the beginning, and she testified that she performed it when the machine was in motion, as as well as when not running, and this her instructor, Tilley, must have known, for he worked with her until the last two or three days before she was injured, and was her only instructor.

We do not think we can, as matter of law, say that from the fact that she saw these wheels and passed them daily that she must be charged with knowledge of the danger she was incurring daily in performing this part of her duty; nor can we say, as matter of law, that she swept this narrow passage "with a full appreciation of the dangers and risks, and with sufficient judgment to know how to avoid them." The jury may well have believed her when she testified that she did not know what a cog-wheel was. She testified that she saw wheels there, but she never noticed them particularly, and this too might have been accepted as true, but the court cannot say, as matter of law, that she was negligent in not noticing these wheels carefully and ascertaining for herself whether or not they were dangerous, since she was never warned to be careful when near them, and was never instructed that any danger lurked in them, and no part of her duty required her to have anything to do with these wheels. It was said in *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42: "The ordinary care which a child of limited judgment and experience is called upon to exercise in a given act is not the same quantum of care which the adult would be called upon to use under the same circumstances. Each is required to use ordinary care, but the amount of care which the person of perfected intelligence and judgment must employ is very different from the amount which the law in its humanity exacts of a minor."

The judgment and order should be affirmed.

Gray, C., and Haynes, C., concurred.

547 For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

Infant Employees are Entitled to Warning of dangers which, on account of their youth and inexperience, they do not fully compre-

hend. If such warning is not given, or if it is inadequate, the master is in fault and must answer for the consequences: *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821; *Addicks v. Christoph*, 62 N. J. L. 786, 72 Am. St. Rep. 687, and cross-reference note thereto, 43 Atl. 196. And the instructions to inexperienced servants, in order to relieve the master from liability, must be such as to enable them to comprehend the dangers of their situation, and appreciate the necessity of adopting prudent methods for their protection: *Taylor v. Wootan*, 1 Ind. App. 188, 50 Am. St. Rep. 200, 27 N. E. 502; *Chicago etc. Co. v. Reinneiger*, 140 Ill. 334, 33 Am. St. Rep. 249, 29 N. E. 1006.

Contributory Negligence on the Part of a Minor is to be measured by his age and ability to discern and apprehend danger. He is required to exercise only such prudence as one of his age may be expected to possess: *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 458; *Tully v. Philadelphia etc. R. R. Co.*, 2 Penne. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019. For the application of this principle to infant servants, see *Foley v. California Horseshoe Co.*, 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; *Newbury v. Getchel etc. Mfg. Co.*, 100 Iowa, 441, 62 Am. St. Rep. 582, 69 N. W. 743.

COURTOIS v. GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN.

[135 Cal. 552, 67 Pac. 970.]

BENEFIT SOCIETIES—DIVORCED BENEFICIARY.—If a member of a benefit society designates his then wife as his beneficiary in accordance with the laws of the society, and dies without changing his beneficiary, the person named, though subsequently divorced from him, is, upon his death, entitled to the benefit, to the exclusion of his second wife and his children by her. (pp. 138, 139.)

BENEFIT SOCIETIES—BENEFICIARIES—CONSTRUCTION OF BY-LAW.—If the by-laws of a benefit society provide that the beneficiary designated by the member and named in the certificate "shall, in every instance, be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him," such provision must be construed as referring to the relationship at the date of the certificate, and a designation of a beneficiary, valid in its inception, so remains, although such relationship has ceased by divorce, or otherwise, unless it is otherwise stipulated in the contract of membership. (p. 139.)

BENEFIT SOCIETIES—RIGHT OF ORDER TO CHANGE OF BENEFICIARY.—If a by-law of a benefit society vests in the designated beneficiary the right to the benefit money immediately upon the death of the member, no subsequent act or resolution of the order can divest it or devote it to the use of another. The prescribed mode of changing the beneficiary must be followed, and no change can be otherwise made. (p. 140.)

BENEFIT SOCIETIES—DIVORCED BENEFICIARY.—If a member of a benefit society designates his wife as his beneficiary,

and she afterward obtains a divorce, and the member then dies without having designated another beneficiary, the fact of the obtaining such divorce is not the legal equivalent of the death of the beneficiary designated, so as to give to the second wife of the member or his heirs any right to the benefit fund which must be paid to the divorced wife. (p. 142.)

T. C. Kierulff, for the appellant.

L. Titus, W. J. Hayes, and W. H. Jordan, for the respondents.

⁵⁵³ HAYNES, C. Gonzague M. V. Courtois was in his lifetime a member of the Ancient Order of United Workmen and while such member there was issued to him a beneficiary certificate in the sum of two thousand dollars, in which Emilie Courtois, then his wife, was named as the beneficiary.

Said Emilie afterward procured a divorce from her said husband, but without any provision for her support, and was permitted to resume her former name of Emilie Etienne. Said G. M. V. Courtois afterward married the plaintiff Annie, and on January 7, 1900, died, without having in any manner changed the designation of the beneficiary of said certificate. Said Annie (the widow) and certain of the children of said Courtois brought this action against the defendant, the grand lodge, to recover two thousand dollars, the benefit named in said certificate, and made Marius J. Courtois, a son of said Courtois, a defendant, he having refused to become a plaintiff. Said Emilie, the beneficiary therein named, not having been made a party, filed her complaint as intervener, and prayed judgment for the sum named in said certificate.

The defendant, the grand lodge, answered the complaint, alleging its willingness to pay said sum of two thousand ⁵⁵⁴ dollars to the heirs of the deceased member, as soon as they could be determined, "and it can be freed from the claim of the intervener," Emilie Etienne, and asked permission to pay the money into court until the court should determine who were the heirs, and what were the rights of said Emilie. No order was made in that regard, however, nor has the grand lodge appealed. The answer of the grand lodge to the intervener's complaint alleged that the "intervener has no right, title, or interest in said fund, or any portion thereof," and fully answered her complaint.

The plaintiffs had judgment against the grand lodge upon said beneficiary certificate, the complaint in intervention was dismissed, and the intervener appeals.

There is no controversy as to the relationship of the several parties to the deceased member, and an agreed statement sets out all of the provisions of the constitution and by-laws of the order so far as necessary to be considered, and it is conceded that such certificates are issued subject to, and are to be construed and controlled by, the laws of the order.

Said constitution and laws provide that upon the death of a full-rate member "such person or persons as said member may have directed while living shall be entitled to have from the beneficiary fund of the order the sum of two thousand dollars." In this case, Courtois, the member, designated as the beneficiary "Emilie Courtois, bearing to him the relation of wife."

The laws of the order require that the beneficiary so designated by the member and named in the certificate "shall in every instance be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him." It is, however, in the power of the member at any time to change the beneficiary. It is also provided that if one or more of the beneficiaries die during the lifetime of the member, the survivor or survivors shall be entitled to the benefit equally, unless otherwise provided in the certificate; and if all shall die during the lifetime of the member, and he shall have made no other direction, the benefit shall be paid to his heirs at law.

It is not questioned that appellant was a competent beneficiary at the time the certificate was issued, nor that she would now be entitled to the benefit named but for the divorce. But did the divorce, under the facts here existing, deprive ⁵⁵⁵ appellant of the benefit provided in said certificate? I think not.

The certificate created a valid contract, upon a sufficient consideration, with the member to whom it issued. The grand lodge promised to pay to the beneficiary therein named, or to such person or persons as said member may have directed while living, upon the death of the member, two thousand dollars. The grand lodge reserved no power in any contingency to substitute any other person as beneficiary during her life. It provided by a by-law that in case of her death, if the member failed to appoint another beneficiary during his lifetime, the benefit should be paid to his heirs at law. The death of the beneficiary was thus provided against, but no other contingency; and in no other contingency than the death of the beneficiary and the failure of the member to appoint

another are the heirs at law entitled to the benefit. Death and divorce are not synonymous, and we cannot read into the contract the one in place of the other. The certificate, or the constitution and laws of the order, might have provided that in case of the wife being named as the beneficiary a divorce should have the same effect as her death upon the disposition of the money. But it is not so provided.

Respondent contends, however, that the by-law which provides that "each person shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him," excludes the intervener from a recovery. This by-law relates to the designation of a beneficiary when he becomes a member of the order and applies for a beneficiary certificate; but there is no provision by which the grand lodge or any of its officers can revoke the certificate in case an authorized beneficiary becomes disqualified as an original appointee by some subsequent act or event. Suppose the beneficiary named in the certificate was at that time a "dependent" upon the member, and had ceased to be such dependent—a case likely to occur—and no other person had been substituted by the member as the beneficiary, will it be contended that upon the death of the member he would not be entitled to the benefit named in the certificate? The evident policy of the order is, that the beneficiary named 556 in the certificate when it issues shall be at that time of the class designated in said by-law, but beyond that it reserves no control, and makes no provision by which it may make or compel a new designation of a beneficiary, or by which it may itself appoint a beneficiary or cancel the certificate.

It is further contended that, as the by-laws are made part of the contract, it follows that the appellant never had any vested interest in this fund. The by-laws provide that the members themselves have no individual property right in the fund from which benefits are paid; that "it does not constitute a part of their estates to be administered upon, nor have they any right in or control over the same, except the power to designate the person or persons to whom, as beneficiaries, the same shall be paid at the death of the member. The beneficiaries thus designated have no vested rights in said sum until the death of the member gives such right; and the designation

may be changed by the member in the method prescribed by the laws of the order at any time before his death."

This by-law vests in the designated beneficiary the right to the money immediately upon the death of the member; but up to the time of his death he may change the designation of the beneficiary, and this power is exclusive; and as the right to the benefit immediately vests in the designated beneficiary upon the death of the member, by force of the by-law just quoted, no subsequent act or resolution of the order can divest it, or devote it to the use of another. In *McLaughlin v. McLaughlin*, 104 Cal. 177, 43 Am. St. Rep. 83, 37 Pac. 867, it is said: "The general and prevailing rule, as shown by these decisions is, that when the laws of a benefit society prescribe a mode of changing the beneficiary, the mode prescribed must be followed, and no change can be made in any other manner": See, also, *Bacon on Benefit Societies*, sec. 307, and cases there cited.

The society which issued the certificate here in question authorized the member to change the designation of the beneficiary by a definite mode of proceeding to be pursued by the member, resulting in the issuance of a new certificate bearing the same number as the one surrendered, and designating therein a new beneficiary, thereby approving the new beneficiary as a proper appointee. As we have seen, the laws of the order provide for but one case in which any person ⁵⁵⁷ other than the beneficiary named in the certificate can take the benefit named, and that is where the beneficiary dies before the member, in which case the benefit goes to the heirs at law, in case the member also dies without having made a new appointment in the mode above provided. It is clear that plaintiffs are not within either of these categories; they were not appointed by the member in his lifetime as beneficiaries, nor did the intervener, the only beneficiary ever named, die in the lifetime of the member.

There are cases where equity has controlled the disposition of the benefit, among which may be cited *Jory v. Supreme Council A. L. of H.*, 105 Cal. 20, 45 Am. St. Rep. 17, 38 Pac. 524; but the equity which controlled in that case was not a mere sentiment, but it accomplished that which the member attempted to accomplish, and would have rightfully accomplished, but for the fraud of the beneficiary named in the original certificate. Here there was no desire manifested or effort

made by the member to change the designation of the beneficiary.

"The general rule undoubtedly is, that a policy of life insurance, or a designation of a beneficiary, valid in its inception, remains so although the insurable interest or relationship of the beneficiary has ceased, unless it is otherwise stipulated in the contract": Bacon on Benefit Societies, sec. 253; Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457.

The provisions of the constitution and laws of benefit societies, as well as the benefit certificates, are almost as various as the different organizations. For an example, see *Tyler v. Odd Fellows' Mutual Relief Assn.*, 145 Mass. 134, 13 N. E. 360, where the by-laws provided that, after the payment of the expenses of the funeral and of the last sickness, the balance should be paid to the person designated by the member, or last legal assignment thereof, "provided such person was an heir or member of the decedent's family." This qualification, of course, controlled the designation made by the beneficiary; and in that case the wife, who was named as the beneficiary, and had been divorced, not being an heir or member of the family of the deceased at the time of his death, was excluded.

In *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75, the beneficiary certificate was issued by the Ancient Order of United Workmen, ⁵⁵⁸ under the same requirements, laws, and regulations as those governing the present case, and in that case, as here, the wife was designated as the beneficiary; she obtained a divorce, and the member died without having designated another beneficiary. It was held that obtaining the divorce was not the legal equivalent of the death of the beneficiary, so as to give to the heirs any right to the fund. The only distinction between that case and this is, that there Mrs. Overhiser was allowed alimony in the sum of nine hundred dollars, to be paid in installments of twenty-five dollars per month, and that at various times both before and after the divorce she paid some of the dues and assessments necessary to keep the certificate in force, but these facts did not influence the decision, as clearly appears from the reasoning of the court.

We think the judgment of the court below in this case is not the legal conclusion from the facts found, and advise that the judgment rendered in favor of the plaintiffs and the defendant Marius J. Courtois, and dismissing appellant's complaint in intervention, be reversed, with directions to enter judgment in favor of the intervener against the defendant,

the Grand Lodge of the Ancient Order of United Workmen, for said sum of two thousand dollars and interest thereon from the date of the judgment appealed from.

Cooper, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment rendered in favor of the plaintiffs and the defendant Marius J. Courtois, and dismissing appellant's complaint in intervention, is reversed, with directions to enter judgment in favor of the intervener against the defendant, the Grand Lodge of the Ancient Order of United Workmen, for said sum of two thousand dollars and interest thereon from the date of the judgment appealed from.

Henshaw, J., Temple, J., McFarland, J.

Hearing in Bank denied.

Insurance—Divorced Wife.—If a married woman is named as beneficiary in an insurance policy on the life of her husband, she is entitled to the proceeds of the policy, though their marital relations are terminated by divorce prior to his death: *Overshire v. Overshire*, 63 Ohio St. 77, 81 Am. St. Rep. 612, 57 N. E. 965. See, also, *McGrew v. Mutual Life Ins. Co.*, 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103. Compare the monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 571.

VERMONT MARBLE COMPANY v. DECLEZ GRANITE COMPANY.

[135 Cal. 579, 67 Pac. 1057.]

CORPORATIONS—TRUST FUND.—ASSETS of an insolvent corporation are held in trust for its creditors, whose claims are prior and superior to those of stockholders. (p. 146.)

CORPORATIONS—LIABILITY FOR UNPAID SUBSCRIPTIONS TO STOCK.—Debts due to a corporation constitute a portion of its assets and may be reached by creditors. Among these are unpaid subscriptions to stock which may be collected by creditors when the corporation itself has released them or in some way deprived itself of that right. (p. 146.)

CORPORATIONS—BASIS OF CREDIT—LIABILITY OF STOCKHOLDERS.—As to creditors, a corporation is presumed to have sought credit upon its stated capital stock at its par value, either actually paid in or due from stockholders, and as between them and creditors the rights of the latter cannot be defeated by any contract between the corporation and its stockholders, or by any device short of actual payment of the par value of such

stock. Public policy requires that the fact whether a creditor did trust the corporation on the basis of its supposed capital stock, at par value, should not be inquired into. (p. 146.)

CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—A stockholder in an insolvent corporation is liable to its creditors for the full par value of his stock, though he has received for a sum less than its par value stock purporting to be fully paid, under an agreement with the corporation to pay less than its par or face value. (p. 150.)

CORPORATIONS—STOCK—CALLS FOR PAYMENT—STATUTE OF LIMITATIONS.—An original call for payment of subscriptions on stock amounting to one-fifth of their par value does not set the statute of limitations in motion as against subsequent calls for the remainder of the par value made by creditors of the corporation. (p. 150.)

CORPORATIONS—TRANSFER OF STOCK.—The transfer of stock by an original stockholder is not sufficiently proved to avoid liability for unpaid calls by evidence that a third person asked to have the stock transferred on the corporation books to a certain transferee, which was not in fact done, there being no evidence that such transferee accepted or authorized the transfer. (p. 151.)

APPELLATE PRACTICE—JUDGMENTS OF NONSUIT.—Upon appeal from a judgment of nonsuit, the evidence must be construed as strongly as possible against the correctness of the ruling of the lower court. The plaintiff is entitled to judgment upon the merits if there is any substantial evidence in his favor. (p. 151.)

Finlayson & Finlayson, for the appellants.

J. F. Conroy, for the respondents.

581 TEMPLE, J. This is an action to collect on behalf of creditors the unpaid balance due on stock of the Declez Granite Company, which has become insolvent. The plaintiff and the intervener have each obtained judgments against the corporation, and executions issued upon such judgments have been returned nulla bona. Only the defendants Flint, Conroy, and Halfhill answered.

The par value of the corporate stock of the Declez Granite Company is one hundred dollars per share. Of this stock, Halfhill owned two hundred and seventy-five shares, Conroy fifty shares, and Flint ten shares. Each stockholder had paid twenty dollars per share upon his stock, and no more. There was no written subscription, but the parties getting up the corporation agreed with each other, orally, before the incorporation, that the corporation would sell the stock to each incorporator for twenty dollars per share, fully paid.

After incorporation, to wit, on the twenty-eighth day of September, 1892, a resolution was passed by the directors to the effect that "the secretary notify the subscribers to the capital stock of the corporation that the stock was now ready to be

issued, and that all subscriptions are now due and payable at the office of the company." The notice was given, and each of the parties who were interested in the enterprise ⁵⁸² paid twenty dollars per share on his stock, whereupon certificates of stock fully paid were issued as agreed upon. Only twenty dollars per share was demanded from the stockholders, and no other call was ever made.

A nonsuit was granted as to the defendants Flint and Conroy. The correctness of this order is questioned here, but as the nonsuit was granted for reasons which affect only the cases of Flint and Conroy, that matter will be separately discussed hereafter. In the other points all defendants are interested.

In regard to the issues which affect all the defendants, it is contended: 1. That the defendants purchased their stock as fully paid stock, paying therefor the market price; it was therefore, as to them, fully paid stock, and nothing remains unpaid on the stock; and 2. The claim is barred by the statute of limitations. Under this, it is contended that the resolution of the board, above set out, was a call for the entire amount due on the stock, and the statute commenced to run against the demand from that date. The action was not commenced within five years after that time.

The appellants contend, in answer to these positions, that, conceding that defendants did not subscribe for their stock, but purchased the same from the corporation as fully paid and at its highest market price, they are still liable to creditors for the unpaid balance.

They deny, however, that there was any market value for the stock, and contend that since defendants themselves got up the corporation, they must be judged as subscribers.

They also contend that the resolution referred to was not, and was not treated, either by the corporation or by the defendants, as a call for the full amount due on the stock, but only for the twenty dollars per share which the corporators had agreed should be received as full payment. And, further, that in no event would the statute begin to run against creditors until the debt of the creditor had matured and suit could be maintained thereon against the stockholders.

Certain constitutional and statutory provisions are supposed to have some bearing upon the questions here raised. Section 11 of article 12 of the constitution declares: "No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious in-

crease of ⁵⁸³ stock or indebtedness shall be void," etc. To the same effect is section 359 of the Civil Code. Section 323 of the Civil Code is to the effect that corporations for profit must issue certificates for stock when fully paid up, and may in their by-laws provide for issuing certificates prior to full payment.

That the assets of a corporation, in case of insolvency, are held in trust for its creditors is not disputed. This is the so-called trust-fund theory. It was first announced by Judge Story in *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944. He said: "It appears to me very clear, upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose." He says, further, that the creditors can look only to this fund for payment, as the stockholders are not personally liable. The capital stock is the sole basis of credit. The shareholders, therefore, while entitled to all profits, have no right to the capital until all creditors have been paid. Of course, a corporation, while it is a going concern and lawfully carrying on the business for which it was organized, may use its funds as freely as any other individual. It is not at all hampered by the idea that it holds its assets in trust for creditors. But when it has ceased to be a going concern, and its assets are to be divided, then the claim of creditors is prior to that of stockholders. Then the court of equity looks beyond the mere fiction of a corporate entity as the sole debtor. The stockholders are themselves the debtors, but as to them the creditor is deemed to have agreed to look only to a special fund—the corporate assets—for payment.

Debts due to a corporation constitute a portion of its assets, and may be reached by creditors. Among these are unpaid subscriptions to stock, and these may sometimes be collected by creditors when the corporation itself has released them, or in some way deprived itself of that right. And as to creditors, the obligation is unconditional, although the corporation has accepted a qualified liability: *Sawyer v. Hoag*, 17 Wall. 610; *Upton v. Tribilcock*, 91 U. S. 48; *Scovill v. Thayer*, 105 U. S. 143; *Sanger v. Upton*, 91 U. S. 56; 2 Morawetz on Corporations, sec. 823 et seq.

⁵⁸⁴ The contention of the respondents, which was sustained by the trial court, seems to be, that this proceeding on behalf

of creditors being an attempt to collect a debt due the corporation, as equitable assets, only that could be recovered which was a debt due the corporation, and that these stockholders never owed the corporation anything. To sustain the action is not only to enforce a liability they have never assumed, but to violate the conditions of their purchase. They were only willing to pay for the stock twenty dollars per share, fully paid, but would not have accepted it as a gift subject to an indebtedness of eighty dollars per share.

As far as the corporation is concerned, there is not much in this, for in this state fully paid stock may be assessed. The question concerns creditors only. As to them the corporation is presumed to have sought credit based upon its supposed capital of one hundred thousand dollars, actually paid in or due from its stockholders. Public policy requires that the fact whether a particular creditor did trust the corporation on that basis should not be inquired into. The constitution and laws require commercial corporations to have a capital stock, the amount of which shall be stated in the articles, and that this can be had of the corporation only for value. It must keep an account of its stock, by whom owned, and the amount of subscriptions unpaid, which may be inspected by every person having an interest therein: Const., art. 12, sec. 14. It may issue its stock and commence business before subscriptions are all paid up, and even before the stock is all subscribed for. Corporations often advertise the amount of its subscribed capital stock, and whether it is fully paid.

In the case of the defendant corporation, the directors, if the theory of the defense is maintainable, might have truthfully advertised that it had a subscribed and paid-up capital of one hundred thousand dollars, when in fact it had only twenty thousand dollars. If, by any lawful device, this can be done, it is plain that the policy of the law will be defeated. And, again, the corporation being a mere agency of the stockholders, for it to release these obligations would be for a debtor to release his own liability. As the supposed capital is the sole basis of credit, the stockholders, who are ⁵⁸⁵ the real parties carrying on the business, must make the representation good.

While there can be no doubt that the rule supported by the weight of authority is as above stated, it is contended that a different rule has been established here. The first case cited in support of this proposition is *Stein v. Howard*, 65 Cal. 616,

4 Pac. 662. The Spring Valley Water Works sold some of its stock at less than par value. It was held that this did not violate section 11 of article 12 of the constitution, which prohibits fictitious increase of stock. The rights of creditors were not involved. Nor were the rights of creditors involved in *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100. The controversy was between different sets of stockholders. The question was whether certain stock had been fully paid, and whether a certain other issue of stock could be assessed without assessing all.

In *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377, something was said which, unexplained, may be thought to sustain the position of respondents. That was an action brought by a creditor to enforce the liability of stockholders for unpaid balance of subscriptions. There had been several different issues of stock. Plaintiff himself owned a large amount of stock. He contended that the particular issue of stock in which he had purchased was fully paid and unassessable, and that he could recover the amount of his debt from the other stockholders. The court discusses the classes of stock which plaintiff claimed were not fully paid, and holds against the plaintiff. As to the remaining issues of stock, which plaintiff contended were fully paid up, and from the owners of which he claimed nothing, the court said: "But it is admitted that as to the remainder of the stock issued the evidence shows that it was sold at the highest market price, and under the decisions of this court the purchasers are not liable for any unpaid balance." The record on that appeal shows that this statement was substantially a quotation from plaintiff's brief, including the reference to the decisions of this court. Neither the opinion nor the briefs in that case cite any such decisions, and there were none. The court, having disposed of plaintiff's claim as to all the other stockholders, merely quotes from plaintiff's brief the admissions that these were not liable. It was a perfectly proper disposition of the case, ⁵⁸⁶ though, unfortunately, it may appear to be authority for a proposition which the court did not decide.

Reliance is placed upon a line of decisions made by the supreme court of the United States. They are: *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. Rep. 468; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. Rep. 476; *Handly v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530. Those cases do, I think, greatly impair the trust-fund doctrine, and, in my humble judgment, the rea-

soning employed is not satisfactory. The questions discussed were not federal questions, and it remains to be seen how generally the decisions will be followed. *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. Rep. 468, was a case in which a construction company took some shares of stock from a railroad company in part payment for a debt due it. The par value of the stock received by the construction company was three hundred and fifty thousand dollars, and the debt satisfied by it was seventy thousand dollars, twenty cents on the dollar of the par value. It was sought to hold the company for the unpaid subscriptions.

Had the case been the usual one where a road is constructed for a fixed sum of money and a definite amount of stock, it might, perhaps, have been held that the stock was fully paid; but the stock was given for a definite sum of money, and it was contended that it was the usual case of selling stock below par, and that no contract with the corporation could release the stockholder from his liability to creditors. The court expressly affirmed the doctrine of the cases above cited, but said the rule did not apply to that case. All the cases above cited from the reports of the supreme court of the United States, and many more, are examined and approved. The distinction attempted is shown as follows: "According to these cases, a stockholder, becoming such by formal subscription or by transfer on the books of the corporation, cannot be discharged to the injury of the creditors by any agreement, arrangement, or device to which creditors do not give their assent, and by which the stockholder is to pay less than the amount due upon such stock; thus, upon the ground stated in *Webster v. Upton*, 91 U. S. 65, that 'neither the stockholders nor their agents, the directors, can rightfully withhold any portion of the stock from the reach of those who have lawful claims against the company,' and that 'the stock thus held in trust is the whole stock, and not merely that percentage of it which has been called in ⁵⁸⁷ and paid.' The present case presents features that are not to be found in the others. It is not the case of an ordinary subscription of stock in a given amount; nor is it strictly one of an ordinary purchase of stock for purposes of investment. It is the case of an insolvent railroad corporation which, in consequence of its inability to pay creditors in money, was threatened with bankruptcy, and which refused or was unable to pay, except in stock which was without market value." But the court repeatedly declares that it has

no desire to modify the salutary rule laid down in the cases cited.

In *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. Rep. 476, the last case is cited, but it is asserted that if stock is sold by a corporation, and issued as fully paid, creditors can inquire into the real consideration, and if it appears that the transaction was not fair, and that a reasonable equivalent was not given for the stock, the holders will be held liable to creditors as upon an unpaid subscription.

In *Handly v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, similar views are expressed. In that case eight hundred shares of stock were given away. Three hundred shares were given to its stockholders. Upon these it was held that the stockholder was liable to creditors for the par value of the shares of stock. Five hundred shares were given as a bonus to purchasers of bonds. Upon these shares of stock it was decided that the stockholder was not liable. They were fully paid.

I must agree with counsel that no sufficient grounds appear for the distinction made. But the court asserts the distinction, and rests its decision upon it, and vigorously asserts the general rule, and, as to the shares of stock given to the stockholder, relies upon it.

In the subsequent case of *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. Rep. 585, Mr. Justice Brown, who wrote the opinion in *Handly v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, took occasion to explain the position of that court upon this subject. He said: "It is the settled doctrine of this court that the trust arising in favor of creditors by the subscription to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the creditors. Nothing that was ⁵⁸⁸ said in the recent cases of *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. Rep. 408, *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. Rep. 476, or *Handly v. Stutz*, 139 U. S. 417, 11 Sup. Ct. Rep. 530, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied to the original subscribers to stock."

Some few cases are cited from the state reports which, it is claimed, held a different view. Opposing counsel contend that there is no real difference. I only wish to say that, if they do

hold a different principle, they are not in line with the current of decisions upon the subject.

There is nothing in the proposition that the respondents did not subscribe for their stock, but purchased it from the corporation. It was not necessary that they should in writing or otherwise formally agree to pay the par value of the stock. The fact that they owned the stock fixed their liability: *Walter v. Merced Academy Assn.*, 126 Cal. 582, 59 Pac. 136, and authorities there cited. In this case, all should be deemed subscribers, for it was agreed among themselves that all stock should be sold for twenty dollars per share, fully paid up. The sale of the stock and payment for it, as agreed—twenty dollars per share—for the first time provided constituents for the company and gave it life. The sale of the stock was an ineffective device to escape liability for subscriptions.

These considerations seem to me to dispose of the contentions both of Halfhill and Conroy. If there was no call for the unpaid portion of the stock liability, the statute of limitations has not commenced to run, and we need not consider the further answer to the contention, that no cause of action would accrue to the creditors until the insolvency of the corporation gave to them the right to maintain a creditors' bill.

We are not inclined to extend the doctrine of *In re South Mountain Min. Co.*, 7 Saw. 30, 5 Fed. 403, to this case, even if we were prepared to indorse the principle there announced. This is not such a mining corporation as was there considered. We refrain, therefore, from a discussion of the question suggested.

Respondent Flint contends that he had ceased to be a stockholder before this proceeding was commenced. The evidence fails to show a transfer. The secretary of the corporation testified that one Snediker applied to him to have the shares transferred to one Mahony, to whom Snediker said Flint had transferred the stock. He showed no authority from Mahony to act for him, and there is no evidence that Mahony ever accepted or consented to such transfer. No transfer was in fact made on the books. In such a case, where the actual result may have been to transfer a liability and not a thing of value, it is particularly necessary to show that the transfer was with the knowledge and consent of the transferee.

As to Flint and Conroy, the judgment was one of nonsuit. In such a case, the presumptions are not strong for the correctness of the ruling. The evidence must be construed as

strongly as possible the other way; for if there is any substantial evidence for the plaintiff, he is entitled to a judgment upon the merits.

The judgment is reversed and the cause remanded for a new trial.

McFarland, J., and Henshaw, J., concurred.

Corporations—Trust Fund.—The assets of a corporation are a trust fund for the payment of its debts: *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; *In re Brockway Mfg. Co.*, 89 Me. 121, 56 Am. St. Rep. 401, 35 Atl. 1012; *Buck v. Ross*, 68 Conn. 29, 57 Am. St. Rep. 60, 35 Atl. 763; *Crofoot v. Thatcher*, 19 Utah, 212, 75 Am. St. Rep. 725, 57 Pac. 171.

Corporations.—Unpaid Subscriptions to the capital stock of a corporation are a trust fund for the benefit of creditors: See the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 808; *Crofoot v. Thatcher*, 19 Utah, 212, 75 Am. St. Rep. 725, 57 Pac. 171. And, as a general rule, a corporation cannot issue its stock at less than the par value, and preclude its creditors from compelling the payment of the difference between the par value and the amount paid for the stock: See the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 820. Consult, also, *Wishard v. Hansen*, 99 Iowa, 307, 61 Am. St. Rep. 238, 68 N. W. 691; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174, 31 Am. St. Rep. 637, 50 N. W. 1117.

PHILLIPS v. CARTER.

[185 Cal. 604, 67 Pac. 1031.]

PUBLIC LANDS—PATENT—COLLATERAL ATTACK.—A desert land patent cannot be collaterally attacked for mere irregularity in its issuance by one who has no superior equities to the holder of the legal title, or has not connected himself with the paramount source of title, and who claims to hold adversely to the legal title. (p. 153.)

PUBLIC LANDS—ASSIGNMENT OF RIGHT OF ENTRY.—A right of entry to desert land in favor of one who has reclaimed such land is assignable, and passes upon the death of the entryman to his widow under a residuary devise to her, and by her may then be assigned to one who may then obtain patent under such entry. (p. 154.)

Roth & McFadzean, for the appellants.

Hannah & Miller and T. M. McNamara, for the respondent.

605 HENSHAW, J. This action is ejectment. Plaintiff claimed and proved title under a patent of the United States.

The land was reclaimed under the desert land act of 1877. The defendants, in possession, did not connect themselves, and did not pretend to connect themselves, with the paramount source of title. They were trespassers, and their contention is, that the patent issued is void. They offered evidence which, they insist, established their contention, and it was rejected by the court. The soundness of the court's ruling in this regard is the principal matter in controversy. The matters which the defendants sought to establish by the rejected evidence are not seriously in dispute. They are the following: One J. A. Foster made an entry of the land in 1877 under the desert land act. Foster died on April 21, 1886, leaving a will. His will did not specifically mention the land in controversy. His widow, Janie A. Foster, was the residuary devisee and legatee, and decree of distribution was made to her in accordance with the terms of the will. On the eighteenth day of April, 1896, the widow sold and conveyed all her rights to the land in question to plaintiff. Plaintiff, on May 9, 1896, made final proof and payment and received his final certificate, and on July 25, 1898, obtained his patent. Defendants entered into possession after final proof and payment so made. During the lifetime of Foster the land had been irrigated and reclaimed by him, or by those acting in his behalf. The original desert entry of Foster, with many ~~600~~ others in the same district, had been suspended by the general land office, and so remained until after 1890, during which time it was, of course, impossible for Foster to make final proof and payment. The final proof and payment, however, were in fact made within the time allowed by the land department after removal of the suspension.

The fundamental contention of appellants growing out of this state of facts is that, under the desert land act, the right of entry is a personal right which dies with the entryman, is not subject to assignment during his life, and does not descend upon his death.

The court, as has been said, rejected the offered evidence upon the ground that the patent upon its face was regular and not void; that, looking back of the patent, there was a law authorizing its issuance, and if any irregularity accompanied that issuance, it could only be taken advantage of by one with superior equities to the holder of the legal title, or by one who connected himself with the paramount source of title, and not at all by one claiming in hostility to the patent, and whose

sole claim to the land came from an entry upon and adverse holding of it against the legal title: *Gale v. Best*, 78 Cal. 239, 12 Am. St. Rep. 44, 20 Pac. 550; *Smelting Co. v. Kemp*, 104 U. S. 636; *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389; *Hartman v. Warren*, 76 Fed. 167; *Doll v. Meador*, 16 Cal. 326; *Chapman v. Quinn*, 56 Cal. 266; *Galvin v. Palmer*, 113 Cal. 53, 45 Pac. 677. In this conclusion we think the court was perfectly correct; but even if the rejected evidence be considered, the position of appellants would not be bettered. There is nothing in the desert land act of 1877, nor in the act of March 3, 1891, amendatory thereof, which either in terms or by express implication prohibits assignments; and while it is true that in construing the acts of the government and of the grants depending thereon, the rule of construction is that most favorable to the grantor, yet the highest tribunal of the country, and the court of last resort for the construction of such acts, has uniformly held that this rule does not impose such a limitation upon ownership, unless by express provision, or by necessary implication, the law must be so read. Thus, in *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. Rep. 963, the court, discussing the law affecting the sale and transfer of soldiers' additional homestead rights before entry, ⁶⁰⁷ says: "The presumption is that Congress intended to make this right as valuable as possible. . . . Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by United States Revised Statutes, section 2306, contravenes no public policy of the nation, violates no statute, and is valid." Without multiplying authorities upon this proposition, it is sufficient to refer to the language of this court in *Rose v. Nevada etc. Lumber Co.*, 73 Cal. 385, 15 Pac. 19, where it is said: "In the absence of an express prohibition against an alienation of the property by the complainant after the issuance of a certificate from the general land office to locate in person or by agent a certain number of acres, we cannot say

that the right so to alienate does not exist. It is a right which need not in terms be granted by the sovereign authority, for it exists, if not expressly prohibited or opposed to public policy."

The right of alienation or assignment, therefore, in the absence of imposed restriction, vests in the entryman, and, as has been said, there is nothing in the law imposing such restriction, while, upon the other hand, equitable considerations impel strongly to the view that such rights should be assignable. The case at bar is illustrative of this. Foster had filed his declaratory statement, paid twenty per cent of the purchase price, and reclaimed the land by irrigation as required by law. He was not permitted to make his final payment and proof, because the right to do so had been peremptorily suspended by order of the land department. Foster then, having done all that the law requires, and being unable to obtain his patent, dies. To hold that his right, perfected in so far as he could perfect it, was not alienable, and did not descend, would mean that the policy of the government was to deprive his heirs of the fruits of his labor and expenditures, and leave the land, with all its improvements, open ⁶⁰⁸ to the first comer who might obtain possession of it. The central idea, and the whole policy of the government, in dealing with these arid lands, was to secure their reclamation upon moderate terms for the benefit of the country. While, of course, having no determinative weight in the matter, the views of the land department are entitled to consideration. The receipts which they originally issued under the act of 1877 tacitly assumed that the rights of the entryman were alienable, and provided in terms that a patent should issue to the entryman "or his assigns or legal representatives." Later, however, the department apparently began to doubt the soundness of its construction of the act, and announced that, while it would not recognize future assignments, it would recognize entries which had been assigned prior to the promulgation of the last decision, and that patents therefor would be issued to assignees. Later again it fully recognized the assignability of such entries. Finally, it may be said that the fancied evils which appellant sees in the construction that such entries are assignable, and that it was to avoid these evils that Congress did not in the act of 1877 expressly make them assignable, are entirely disposed of by the fact that Congress, in the amendatory act of 1891, instead of

expressly declaring them to be unassignable, expressly declared them to be assignable.

The judgment and order appealed from are affirmed.

Temple, J., and McFarland, J., concurred.

Land Patent—Impeachment.—A patent to public land issued by the general land office, and not void upon its face, cannot be questioned, either directly or collaterally, by persons who do not show themselves to be in privity with a common or paramount source of title: *Johnson v. Drew*, 34 Fla. 130, 43 Am. St. Rep. 172, 15 South. 780. The issuance of a patent to public land by the proper officers of the land department cannot be collaterally attacked: *Gale v. Best*, 78 Cal. 235, 12 Am. St. Rep. 44, 20 Pac. 550; *Johnson v. Drew*, 34 Fla. 130, 43 Am. St. Rep. 172, 15 South. 780. See, too, *Lamprey v. Mead*, 54 Minn. 290, 40 Am. St. Rep. 328, 55 N. W. 1132. But a patent may be shown to be void, whether in a collateral proceeding or not, by proving that the land department had no jurisdiction to dispose of the land described in the patent: *Edwards v. Rolley*, 96 Cal. 408, 31 Am. St. Rep. 234, 31 Pac. 267.

Public Lands.—On the transfer of settlers' rights, see *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192, and note, 30 Pac. 1022. And on encumbrances by claimants of public lands, see the monographic note to *Wilcox v. John*, 52 Am. St. Rep. 249-254. The owner of a timber claim has no devisable interest therein before patent issues: *Cooper v. Wilder*, 111 Cal. 191, 52 Am. St. Rep. 163, 43 Pac. 591. See, in this connection, *Wittenbrock v. Wheadon*, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664.

JOHNSON v. LANGDON.

[135 Cal. 624, 67 Pac. 1050.]

CORPORATIONS—INSPECTION OF BOOKS—MANDAMUS.

A stockholder in a corporation has the right to inspect its books, records, and journals, and mandamus against their legal custodian to compel the permission of inspection is the appropriate remedy of the stockholder upon refusal to allow him such inspection. (p. 158.)

CORPORATIONS—RIGHT TO INSPECT BOOKS—DEFENSE.

—Upon an application by mandamus by a stockholder to compel permission to inspect the books, records, and journals of the corporation, it is no defense that the objects and purposes of the inspection are improper, and that the petitioner desires to injure the business of the corporation. The shareholder is not required to show any reason or occasion for making the examination, nor can his right thereto be defeated by inquiry into his motives therefor. (p. 158.)

W. H. Carlin, for the appellant.

J. E. Ebert and Johnson & Redington, for the respondent.

⁶²⁴ COOPER, C. Plaintiff, a stockholder of the corporation of which defendant is secretary, filed his verified petition for a writ of mandate to compel defendant, as such secretary, to permit him to inspect the books, records, and journals of the said corporation. After a demurrer was overruled to the complaint, the defendant answered, and in his answer set forth affirmatively that the object and purpose of the plaintiff is to injure the corporation of which defendant is secretary, and to gain information for the private use of plaintiff, in connection with two other corporations, of which plaintiff is a stockholder, engaged in a similar business to that of the corporation represented by defendant.

The court below, on motion of plaintiff, made an order striking out the affirmative portion of defendant's answer. Defendant then admitted in open court that he had refused, ⁶²⁵ and continued to refuse, to allow plaintiff, as a stockholder, to inspect the list of subscribers and advertising contracts of the corporation represented by him.

The court thereupon filed findings, upon which judgment was entered for plaintiff as prayed. This appeal is from the judgment.

It is contended by appellant that the petition does not state facts sufficient, and that the court erred in striking out the affirmative answer. A writ of mandate will issue from a superior court to any inferior tribunal, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law: Code Civ. Proc., secs. 1085, 1086. It is provided in the constitution that every corporation doing business in this state shall have and maintain an office or place for the transaction of its business, where transfers of stock shall be made, and in which shall be kept, for inspection by every person having an interest therein, books in which shall be recorded certain transactions: Const., art. 12, sec. 14.

The code requires all corporations for profit to keep a record, among other things, of all their business transactions, "such records to be open to the inspection of any director, member, stockholder, or creditor of the corporation": Civ. Code, sec. 377.

It is admitted that the defendant, as secretary, has charge of the books, records, and entries of business transactions of the corporation. In such matters he represents the corpora-

tion. It seems evident that it is the right of plaintiff to inspect, and the duty of defendant to allow the inspection, of the records of the corporation. As a stockholder, plaintiff is interested in all the affairs and the management of the corporation. He is, in one sense, a part owner of the assets, his part being represented by the number of shares owned by him. The corporation is a creature of the statute, and it is subject to the constitution and laws of the state under which it was incorporated, and under whose protection it transacts business. The action at law for damages is not a plain, speedy, or adequate remedy. Such action might be delayed until the judgment that might be obtained could not be enforced. The ⁶²⁶ very information sought by the stockholder, and withheld from him by the corporation, might be the basis of the action for damages. The law does not contemplate that the stockholder's right to an inspection shall be defeated by showing that he could maintain an action for damages. The remedy by mandamus is the appropriate remedy of the stockholder in case of a refusal of the statutory right: High on Extraordinary Legal Remedies, 3d ed., sec. 308, and cases cited; 2 Cook on Corporations, 4th ed., sec. 514.

At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation: 2 Cook on Corporations, sec. 513; *Stone v. Kellogg*, 165 Ill. 204, 56 Am. St. Rep. 240, 46 N. E. 222. But the writ would not issue as a matter of course to enforce a mere naked right, or to gratify mere idle curiosity, but it was necessary for the petitioner to show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination was desired: High on Extraordinary Legal Remedies, 3d ed., sec. 310. But the great weight of the American authorities is to the effect that where the right is statutory it is not necessary for the petition to aver or show the purposes or object of the inspection. Neither is it any defense to allege that the objects and purposes are improper, and that the petitioner desires to injure the business of the corporation. The clear legal right given by the constitution and the statute cannot be defeated by stopping to inquire into motives. If this were so, the stockholder would be driven from the certain definite right given him by the statute to the realm of uncertainty and speculation. The small stockholder—whose rights are as sacred in the eyes of the law as those of the rich owner of the majority of the stock—would

be refused the right of inspection given him by the statute, and when he comes into court setting forth his rights, and the fact that he is a stockholder, and has been refused permission to inspect the books, he is met by an answer of the corporation setting forth that he is not seeking the information nor the inspection for any legitimate purpose, and that his motives are improper. In the trial of this affirmative defense witnesses are required and expenses incurred. If the court should find in favor of ⁶²⁷ the corporation, and deny the petitioner's right, he is driven to an appeal. In the appellate court he is met by the rule that a finding of fact based upon conflicting testimony cannot be disturbed. Thus the certain, adequate, and summary remedy for the right given by statute is driven into the realm of uncertainty, expense, and delay. Such was not the intent of the framers of the constitution, nor of the legislature in enacting the statute. The statute is founded upon the principle that the shareholders have a right to be fully informed as to the conditions of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed. The shareholder is not required to show any reason or occasion for making the examination. Nor can he be met with the defense that his motives are improper: *People v. Goldstein*, 37 N. Y. App. Div. 550, 56 N. Y. Supp. 306; *State v. St. Louis etc. Ry. Co.*, 29 Mo. App. 307; *Stone v. Kellogg*, 165 Ill. 204, 56 Am. St. Rep. 240, 46 N. E. 222; *Foster v. White*, 86 Ala. 469, 6 South. 88; *Mitchell v. Rubber Reclaiming Co. (N. J.)*, 24 Atl. 407; *Weihenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 199, 78 Am. St. Rep. 707, 56 N. E. 1033; *Dickerman v. Northern Trust Co.*, 176 U. S. 190, 20 Sup. Ct. Rep. 311.

It may be conceded that cases may arise in which a small stockholder, largely interested in some other corporation, desires the information for improper purposes. But we cannot presume such purpose or motive, nor can we allow it as a defense to an application for a writ of mandate. We must presume that the owner of part of the stock of a corporation is interested in its welfare and prosperity; that he desires to know the condition of its business affairs, for the same reason that any prudent business man would desire to know the condition and management of his private affairs. If the corporation might be injured in certain cases, it is no more than is often the case with private owners of property. The law will

presume that any damage done by a stockholder to the corporation of which he is a member can be recovered in an action at law. When a case arises in which the stockholder has obtained information of a secret nature, and furnished it to a rival company or corporation, to the injury and damage of the corporation for whom the information is obtained, it ⁶²⁸ will be time to deal with it. We do not think public policy demands that such defense can be made to a clear legal right.

We advise that the judgment be affirmed.

Haynes, C., and Smith, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. Harrison J., Garoutte, J., Van Dyke, J.

Hearing in Bank denied.

The Right of a Stockholder to Inspect the Books and papers of the corporation is usually enforced by mandamus: *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *State v. North American Land etc. Co.*, 106 La. 621, post, p. 309, 31 South. 172; but injunction is a proper remedy: *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033. The right is absolute, except that it shall not be exercised from idle curiosity or for improper or unlawful motives. Their custodian cannot question the motives and purposes of the stockholder in making the examination: *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 78 Am. St. Rep. 707, 56 N. E. 1033; *Ellsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588. It has been held, however, that the refusal of the right to inspect the corporate books is justifiable when curiosity is the motive, or when the object is manifestly in opposition to the interests of the corporation: *Legendre v. New Orleans Brew. Assn.*, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 South. 837.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

KOEPKE v. HILL.

[157 Ind. 172, 60 N. E. 1039.]

JUDGMENTS—COLLATERAL ATTACK.—Whenever a court is confronted with a question which it has a right to decide, its erroneous judgment will not be subject to a collateral attack, irrespective of whether the mistake of law concerned the common, statutory, or constitutional law. (p. 164.)

A JUDGMENT UNDER A STATUTE ERRONEOUSLY HELD CONSTITUTIONAL is not void. (p. 166.)

HABEAS CORPUS—UNCONSTITUTIONAL ORDINANCE.—A judgment of conviction of a competent court is not void because the statute or ordinance that defines the offense is unconstitutional, and the refusal to quash a writ of habeas corpus for the release of the defendant is error. (pp. 163, 166.)

A. Gilchrist, C. A. De Bruler, and D. C. Givens, for the appellant.

F. B. Posey and D. Q. Chappell, for the appellee.

173 BAKER, J. On his application for a writ of habeas corpus, appellee was discharged from the custody of appellant as sheriff of Vanderburgh county.

The facts shown by the petition are these: In 1893 the legislature gave to cities of the class to which Evansville, in Vanderburgh county, belongs the right "to license, tax, and regulate branch stores or establishments, and all other concerns established in said city for temporary business only": Burns' Rev. Stats. 1894, sec. 3927. The city of Evansville in 1894 passed and promulgated an ordinance entitled, "An ordinance

to license, tax, and regulate branch stores or establishments and all other concerns established in the city of Evansville for temporary business only." The first section declared "that it shall be unlawful to establish, conduct, or maintain any branch store or establishment, or any other store or concern in said city for temporary business only, without first procuring a license therefor." The second section fixed the license fee at twenty-five dollars a day for the first thirty days and ten dollars a day for each day thereafter. The third section prescribed how an application for license should be made. The fourth section denounced the maintenance of branch or temporary stores without license, and provided a fine for each day's violation. The fifth section declared an emergency. The sixth and last section repealed conflicting ordinances. In 1899 appellee, as agent of a Chicago house, opened in Evansville a temporary store for the sale of works of art. The business was innocuous to public morals. After appellee had conducted the business some time, twenty-six affidavits were filed in the police court of the city of Evansville, each charging that appellee on a day named "did violate sections 3 and 4 of an ordinance of said city, which ordinance was duly passed by the common council of said city on October 8, 1894, and duly published according to law on October 17⁴ 9 and 16, 1894, by then and there unlawfully establishing, locating, conducting, and maintaining a temporary store for the sale of pictures and merchandise in the city of Evansville for temporary business only, without first procuring a license to do so." Warrants were issued, upon which appellee was arrested, and brought before the court. He pleaded not guilty, was tried, convicted, and sentenced in each case to pay a fine of ten dollars and costs. On default of payment of the fines, mittimus were issued, on which appellee was committed to the custody of appellant as sheriff, and the time of commitment had not expired when appellee's petition for habeas corpus was filed in the Vanderburgh circuit court. Appellee, in his petition, alleged "that his restraint is illegal in this, that said pretended ordinance is repugnant to the constitution of the state of Indiana and to the constitution of the United States, and is beyond the authority of the city of Evansville, because no such power has been granted to it by its charter or the laws of the state."

Appellant's motion to quash the writ was overruled, and error is assigned on that ruling, among others.

Counsel for appellee very forcefully contend that the ordinance is invalid on the grounds stated in the petition. Counsel for appellant with equal vigor argue to the contrary, but first insist that the question as to the proper construction of the various constitutional provisions, and of the statutes conferring powers upon cities, and of the ordinance of the city of Evansville, was not open to investigation on habeas corpus proceedings. Whether or not this contention is true is a question that lies at the threshold of the case.

Section 1133 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, and Horner's Rev. Stats. 1897, sec. 1119), provides that "no court or judge shall inquire into the legality of any judgment or process whereby the party is in his custody, or discharge him when the term of commitment has not expired, in either of the cases following: 2. Upon any process issued on any final judgment of a court of competent jurisdiction." The police ¹⁷⁵ court of the city of Evansville is a court of record, and the statute creating it expressly declares that "all its judgments, decrees, orders, and proceedings shall have the same force and effect as those of the criminal or circuit courts, except that no judgment shall be a lien on real estate otherwise than is provided by taking transcript": Acts 1893, p. 65 et seq., sec. 113; Burns' Rev. Stats. 1894, sec. 4017; *Peters v. Koepke*, 156 Ind. 35, 59 N. E. 33, 35. The police court of the city of Evansville has exclusive original jurisdiction of all violations of ordinances of the city, and original concurrent jurisdiction with the circuit court in cases of certain felonies and misdemeanors: Acts 1893, p. 65 et seq., secs. 115, 116; Burns' Rev. Stats. 1894, secs. 4019, 4020; Acts 1895, p. 258 et seq. sec. 33; Burns' Supp. 1897, sec. 4020. It thus appears from the law of its creation that the police court of the city of Evansville was a competent court, and indeed the only competent court, in which to prosecute actions for violations of the city's ordinances.

No question arises in this case with respect to usurpation of authority by a court of inferior jurisdiction in acting in a matter outside of the charter of its powers, as if, for example, a justice of the peace, instead of binding over a party

accused of murder to the criminal or circuit court for trial, should convict the accused and sentence him to be hanged: *Miller v. Snyder*, 6 Ind. 1. For the police court of Evansville, so far as the right to hear and determine a charge of violating an ordinance of the city is concerned, stands on as broad a footing as the circuit court of the county does in regard to the trial of an indictment for murder. The particular question, therefore, is this: Is the judgment of a court, which is the only tribunal before which the prosecutor can bring his charge of some alleged offense, void because the statute or ordinance that defines the offense is unconstitutional?

The supreme court of the United States and many of the state supreme courts answer the question in the affirmative: *Church on Habeas Corpus*, 2d ed., sec. 83; 15 Am. & Eng. 176 Ency. of Law, 2d ed., p. 204. In this state, however, the holdings have been to the effect that, whenever a court is confronted with a question which it has a right to decide correctly, its erroneous judgment will not be subject to a collateral attack, irrespective of whether the mistake of law concerned the common, or statutory, or constitutional law: *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90; *Cassel v. Scott*, 17 Ind. 514; *Wentworth v. Alexander*, 66 Ind. 39; *Lowery v. Howard*, 103 Ind. 440, 3 N. E. 124; *Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8; *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. Rep. 658, 27 N. E. 152; *Board of Guardians v. Shutter*, 139 Ind. 268, 34 N. E. 665; *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124; *Hiatt v. Town of Darlington*, 152 Ind. 570, 53 N. E. 825; *Pritchett v. Cox*, 154 Ind. 108, 56 N. E. 20; *Winslow v. Green*, 155 Ind. 368, 58 N. E. 259; *Webber v. Harding*, 155 Ind. 408, 58 N. E. 533; *Peters v. Koepke*, 156 Ind. 35, 59 N. E. 33. In *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. Rep. 658, 27 N. E. 152, a judgment of conviction upon an affidavit which failed to charge a public offense was held to be impervious to a collateral assault. The failure to charge a public offense did not result from a deficient statement of facts. The facts were fully alleged. *McLaughlin* was charged with maintaining a public nuisance by erecting a high and useless fence which interfered with one Fraly's use of his own property. The mistake was with respect to the statutory law. There was no statute which denounced the acts done by Mc-

Laughlin as a public offense. And yet the court before which the charge was presented determined that there was. Surely, it is no greater a mistake of law to decide that a statute (unconstitutional in the opinion of some other tribunal) does not contravene the constitution than to hold that there is a statute which declares certain acts to constitute a public offense when there is no such statute. In *Cassel v. Scott*, 17 Ind. 514, Cassel filed certain bonds in the auditor's office of Wayne county in compliance with an act "to regulate the retailing of spirituous liquors." The act was held to be unconstitutional in *Meshmeier v. State*, 11 Ind. 482. A judgment was obtained on Cassel's bonds, and he sought ¹⁷⁷ to enjoin the collection of the judgment. In the action on the bonds Cassel could have successfully maintained the defense of no consideration because the act was unconstitutional, but he was not permitted to attack the judgment collaterally. The common law, the statutes, and the constitutions make up the law of the land. They are all law. On principle, it is not perceived why a mistake in constitutional law should be visited with more serious consequences than a mistake in common or statutory law. "For if a person," as Judge Vanfleet says in section 75 of his work on *Collateral Attack*, "should be tried on an information and be sentenced to be hanged, and the sentence should be confirmed and carried out by order of that court, and then the court, on further reflection, or by change of members, should come to a different conclusion in another case, and hold that in all such cases the constitution required an indictment, all persons engaged in the taking off of the first person would be guilty of manslaughter, and liable for damages at the suit of his widow. . . . When any court, with all the facts and all the law before it, deliberately orders some malefactor to be incarcerated, and compels the officers to carry out its sentence under pain of severe punishment upon refusal, and then as deliberately entertains an action by him against them for false imprisonment, because it has changed its mind on the law, it can hardly expect such officers or their friends to entertain a very high respect for it."

In this case an affidavit was presented to the police court of the city of Evansville, charging appellee with violations of a city ordinance. There was no other court of original

jurisdiction in which the charge could be filed and determined. The court was in duty bound to act. It had to decide whether the facts stated made a case within the ordinance, and whether the ordinance was within the delegated legislative power of the city, and, if so, whether the ordinance and statute authorizing it conflicted with any provision ¹⁷⁸ of the constitution. These were all questions of law, and if the court had jurisdiction to decide them correctly, it likewise had jurisdiction to decide them erroneously. If the ordinance in question was an exercise of the police power, it might be held valid; if of the taxing power, invalid. That this, one of the questions before the court was at least debatable may be seen by a comparison of the cases of *City of Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857, and *Pabst Brewing Co. v. City of Terre Haute*, 98 Fed. 330, wherein opposite conclusions were reached on the question whether a somewhat similar ordinance was an exercise of the police power or of the taxing power. If the police court had decided that this ordinance was an invalid exercise of the taxing power, and then the same or a higher tribunal had held the ordinance to be a valid exercise of the police power, it is conceivable that appellee might insist upon his former acquittal as a bar to another prosecution for the same acts, although the judgment of acquittal was founded wholly upon a mistake in constitutional law. The conclusion that a judgment under a statute which is erroneously held to be constitutional is not void, is supported by the cases of *People v. Jonas*, 173 Ill. 316, 50 N. E. 1051; *In re Underwood*, 30 Mich. 502; *In re Coffeen*, 38 Mich. 311; *In re Maguire*, 114 Mich. 80, 72 N. W. 15; *Ex parte Fisher*, 6 Neb. 309.

If a federal question were duly presented, we would be constrained to follow the decisions of the supreme court of the United States. But the averments of the petition disclose that the ordinance applies to residents and nonresidents without discrimination, and that the goods were within this state before and when offered for sale. The petition does not allege that the owners of the goods were not residents of this state. They may have resided here and owned a business in Chicago. No question of a denial of the equal protection of our laws, or of an interference with interstate commerce, is involved: *City of South Bend v. Martin*, 142 ¹⁷⁹ Ind. 31, 41 N. E. 315;

City of Huntington v. Mahan, 142 Ind. 695, 51 Am. St. Rep. 200, 42 N. E. 463; Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 367.

Judgment reversed, with instructions to quash the writ.

WHEN A PRISONER MAY BE RELEASED ON HABEAS CORPUS AFTER JUDGMENT AND SENTENCE.

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I. Scope of Habeas Corpus Generally.

a. Nature and Purpose of the Writ.—The writ of habeas corpus is an ancient prerogative writ. It is granted to inquire into all cases of illegal imprisonment: *In re Patzwald* (Okla., July 30, 1897), 50 Pac. 139; *Commonwealth v. Lecky*, 1 Watts, 66, 26 Am. Dec. 37. The great object of the writ is to obtain immediate relief from illegal confinement: *State v. Galloway*, 5 Cold. 326, 98 Am. Dec. 404; to liberate those who may be imprisoned without sufficient

cause, and to deliver them from unlawful custody. Its purpose is to require the person who answers it to show upon what authority he detains the prisoner: *State ex rel. Arkansas Industrial Co. v. Neel*, 48 Ark. 283, 3 S. W. 631. Its office is not to determine the guilt or innocence of a prisoner, but only to ascertain whether he is restrained of his liberty by due process of law: *Lacey v. Palmer*, 93 Va. 159, 57 Am. St. Rep. 795, 24 S. E. 930.

It is well understood, of course, that habeas corpus is a collateral remedy, and subject to the limitations common to collateral proceedings. This proposition calls for no extended citation of authorities. It is recognized in all the decided cases: See *Ex parte Senior*, 37 Fla. 1, 19 South. 652; *Turney v. Barr*, 75 Iowa, 758, 38 N. W. 550; monographic note, *Morrill v. Morrill*, 23 Am. St. Rep. 108.

b. Review of Final Judgments in General.

1. **General Principles.**—Persons restrained of their liberty in virtue of the final judgment of any competent tribunal, or in virtue of any execution issued thereon, are excluded, generally speaking, from the benefits of habeas corpus. Such persons are not illegally restrained. They are deprived of their liberty by due process of law. After conviction by a court having jurisdiction, though it be irregular and erroneous, the party is not entitled to this writ. The judgment and proceedings of another competent court cannot be revised on habeas corpus. Its judgment is conclusive. It puts an end to inquiry concerning the fact in issue by deciding it: *Platt v. Harrison*, 6 Iowa, 79, 71 Am. Dec. 389; *Clifford v. Heller*, 63 N. J. L. 105, 42 Atl. 155; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *In re Brittain*, 93 N. C. 587; *In re Patzwald* (Okla., July 30, 1897), 50 Pac. 139; *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374; *Ex parte Watkins*, 3 Pet. 193, 202.

To entitle one to be released, on habeas corpus, from a judgment restraining him from his liberty, the judgment must be void, and not merely erroneous: *State v. McMahon*, 69 Minn. 265, 72 N. W. 79; *In re Fanton*, 55 Neb. 703, 70 Am. St. Rep. 418, 76 N. W. 447; *In re Walker*, 61 Neb. 803, 86 N. W. 510; *Ex parte Branch* (Tex. Cr. App.), 37 S. W. 417; *In re Dougherty*, 27 Vt. 325; *Ex parte Hays*, 15 Utah, 77, 47 Pac. 612; *In re Casey* (Wash., Mar. 17, 1902), 68 Pac. 185; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. Rep. 1263. It is incumbent on the prisoner to show that the judgment is void, or that he has served the sentence imposed thereby: *Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8; *State v. Taxing Dist.*, 16 Lea, 240; *In re Greenwald*, 77 Fed. 590. And "it is only when the court pronounces a judgment in a criminal case which is not authorized by law, under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void, so as to justify the discharge of the defendant held in custody by such judgment":

State v. Sloan, 65 Wis. 647, 27 N. W. 616; citing *Ex parte Gibson*, 31 Cal. 628, 91 Am. Dec. 546; *People v. Liscomb*, 60 N. Y. 571, 18 Am. Rep. 211; *In re Perry*, 30 Wis. 268; *Ex parte Lange*, 18 Wall. 163.

But if the judgment is void, either because of want of jurisdiction in the court over the offense charged, or because the judgment is one of a character which the law does not, under any circumstances, authorize to be pronounced in a case of the kind, or is simply in excess of that which the law does authorize, and the same, in so far as it is authorized by law, has been performed, or is for other reason illegal, as distinguished from merely erroneous or irregular, it may be assailed collaterally, and habeas corpus is a proper remedy: *Ex parte Bowen*, 25 Fla. 214, 6 South. 65; *People v. Whitson*, 74 Ill. 20; *Feeley's Case*, 12 Cush. 598; *Ex parte Page*, 49 Mo. 291; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *In re Permstick*, 3 Wash. 672, 28 Am. St. Rep. 80, 29 Pac. 350; *Croppen v. Commonwealth*, 2 Rob. (Va.) 842; *Ex parte Lange*, 18 Wall. 163; *United States v. Patterson*, 29 Fed. 775; *In re Reese*, 98 Fed. 984; *In re Burns*, 113 Fed. 987.

2. *Statutory Provisions.*—Many of the states have statutes providing that "no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the following cases: . . . 2. Upon any process issued on any final judgment of a court of competent jurisdiction." Other states have statutes substantially the same. Such statutes are constitutional: *In re Lybarger*, 2 Wash. 131, 27 Pac. 1075. Just what effect, however, they have on the scope of habeas corpus does not seem to have been clearly determined by the decided cases. Obviously, they cannot substantially impair the constitutional right to this writ. This writ cannot be abrogated, or its efficiency curtailed, by legislative action. Cases within the relief afforded by it at common law cannot, until the people voluntarily surrender the right to this, the greatest of all writs, by an amendment to the organic law, be placed beyond its reach and remedial action: *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

"There is no question," says Tarsney, J., in *In re Patzwald* (Okla., July 30, 1897), 50 Pac. 139, "but that at the common law, and in the absence of a statute, illegality which makes void a judgment in a criminal action, no matter by what court such judgment may have been rendered, may be inquired into on habeas corpus, and, if the judgment is found to be void, the prisoner may be discharged. Does our statute change this rule of the common law, and take away this right of inquiry? If such were the intended effect of the statute, our answer would be, the power is not in the legislature to take away this right. . . . That provision of the constitution [article 1, section 10] is a guaranty that the right of habeas

corpus should remain as it existed at the common law, and should not be curtailed by legislative enactment, or by subtle and metaphysical judicial interpretation, and legislatures can no more prevent its application to cases where it would have been applicable at common law than they can abrogate the right of trial by jury. Nor do we think that it was intended by our legislature to curtail the privileges of this writ."

And Allen, J., in *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, in construing the New York statute, observes: "To bar the applicant from a discharge from arrest by virtue of a judgment or decree, or an execution thereon, the court in which the judgment or decree is given must have had jurisdiction to render such judgment. The tribunal must be competent to render the judgment under some circumstances. The prohibition of the forty-second section of the habeas corpus act, forbidding the inquiry, by the court or officer, into the legality of any previous judgment, decree, or execution specified in the twenty-second section, does not, and cannot, without nullifying, in good measure, the provisions of that and other sections of the act, take from the court or officer the power to relieve him from the duty of determining whether the process, judgment, decree, or execution emanated from a court of competent jurisdiction; and whether the court making the judgment or decree, or issuing the process, had the legal and constitutional power to give such judgment, or send forth such process. It simply prohibits the review of the decision of a court of competent jurisdiction. If the record shows that the judgment is not merely erroneous, but such as could not, under any circumstances, or upon any state of facts, have been pronounced, the case is not within the exception of the statute, and the applicant must be discharged. If the judgment is merely erroneous, the court having given a wrong judgment when it had jurisdiction, the party aggrieved can have relief only by writ of error, or other process of law. He cannot be relieved summarily by habeas corpus."

c. **Correction of Errors.**—Mere errors and irregularities in the proceedings leading up to a judgment of conviction are not reviewable on habeas corpus for the discharge of a prisoner committed under process issued on a final judgment of a court of competent jurisdiction: *People v. Murphy*, 188 Ill. 144, 58 N. E. 984; *In re Black*, 52 Kan. 64, 39 Am. St. Rep. 331, 34 Pac. 414; *McCarty v. Hopkins*, 61 Neb. 550, 85 N. W. 540; *Ex parte Schwartz*, 2 Tex. Ap. 74; *Ex parte Matthews* (Tex. Cr. Rep.), 49 S. W. 623. Neither are mere defects in the judgment or sentence itself, or irregularities after it is pronounced: *Ex parte Roberson*, 123 Ala. 103, 82 Am. St. Rep. 107, 26 South. 645; *People v. Cavanagh*, 2 Park. C. C. 650, 2 Abb. Pr. 84; *Ex parte Beeler* (Tex. Cr. App.), 53 S. W. 857. The writ does not deal with errors or irregularities rendering a proceeding or judgment merely voidable, but only with such radical defects as render it abso-

lutely void: *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305, 55 N. W. 830; *Barton v. Saunders*, 16 Or. 51, 8 Am. St. Rep. 261, 16 Pac. 921. And this is true, though no appeal will lie from the judgment: *Ex parte Boland*, 11 Tex. App. 159. If the court has jurisdiction of the person of the accused and of the crime charged, and does not exceed its lawful authority in passing sentence, its judgment is not void, whatever errors may have preceded the rendition thereof: *State v. Leidigh* (Neb.), 75 N. W. 24. And after the court has acquired jurisdiction, the subsequent proceedings, however erroneous, constitute no ground for the discharge of the convicted party on habeas corpus: *Smith v. Clausmeyer*, 136 Ind. 105, 43 Am. St. Rep. 311, 35 N. E. 904; *Williams v. Hert*, 157 Ind. 211, post, p. 203, 60 N. E. 1067.

Habeas corpus proceedings cannot be used to authorize the exercise of appellate jurisdiction: *Ex parte Gafford*, 25 Nev. 101, 83 Am. St. Rep. 568, 57 Pac. 484. The writ is not a corrective remedy, and cannot have the force and effect of an appeal or a writ of error or certiorari, nor is it designed as a substitute for either: *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305, 55 N. W. 830; *Ex parte Mitchell*, 104 Mo. 121, 24 Am. St. Rep. 324, 16 S. W. 118; *In re Langston*, 55 Neb. 310, 75 N. W. 828; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55. Neither can it be used as a substitute for a demurrer or a motion to quash: *Ex parte Prince*, 27 Fla. 196, 26 Am. St. Rep. 67, 9 South. 659. If one perfects an appeal from a conviction, he has no right to a writ of habeas corpus, where all questions raised on his application can be decided on the appeal: *Ex parte Barfield* (Tex. Cr. Rep.), 44 S. W. 1095.

But the fact that one has a right of appeal from a judgment against him does not prevent him from applying for a writ of habeas corpus, if the judgment is void because the court was without jurisdiction: *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *In re Permstick*, 3 Wash. 672, 28 Am. St. Rep. 80, 29 Pac. 350.

d. Jurisdictional Questions.

1. **In General.**—The jurisdiction of a court or judge to render a particular judgment or sentence is always a proper subject of inquiry on habeas corpus: *State v. Kinmore*, 54 Minn. 135, 40 Am. St. Rep. 305, 55 N. W. 830; *Ex parte Dela*, 25 Nev. 346, 83 Am. St. Rep. 603, 60 Pac. 217; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *In re Snow*, 120 U. S. 274, 7 Sup. Ct. Rep. 556. Indeed, the question of jurisdiction is the primary, and generally the only, question open to investigation. An examination of almost any case in which habeas corpus has been invoked for relief from a final judgment will disclose that the inquiry made is this: Do the errors and irregularities complained of and relied on for relief rise to the dignity of jurisdictional defects? If the conclusion is reached that they do, then the petitioner is entitled to his discharge; if they do not, then he is remanded to confinement: *Ex parte Bizzell*,

112 Ala. 210, 21 South. 371; In re Bushey, 105 Mich. 64, 62 N. W. 1036; State v. Matter, 78 Minn. 377, 81 N. W. 9; In re Graham, 76 Wis. 366, 44 N. W. 1105; Kingen v. Kelley, 3 Wyo. 566, 28 Pac. 36; In re Boyd, 49 Fed. 48; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. Rep. 935.

2. **Elements of Jurisdiction.**—While the authorities are agreed that the jurisdiction of the court rendering the judgment or imposing the sentence is the primary question on habeas corpus, they are not entirely agreed as to what is comprehended within the term “jurisdiction” as used in this sense. Some decisions, particularly the earlier ones, lay down the doctrine that when the court has jurisdiction of the subject matter and of the person of the defendant, its judgment is conclusive on habeas corpus. It is believed, however, that in order to render the judgment immune from attack, the court must have had not only jurisdiction of the subject matter and of the person of the defendant, but also authority to render the particular judgment in question. If either of these elements is wanting, the judgment is fatally defective and subject to collateral attack. Jurisdiction to render the particular sentence imposed is as essential to its validity as jurisdiction of the person or subject matter: Ex parte Cox (Idaho), 32 Pac. 197; People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; Miskimins v. Shaver, 8 Wyo. 392, 58 Pac. 411; Nielsen, Petitioner, 131 U. S. 176, 183, 9 Sup. Ct. Rep. 672; Church on Habeas Corpus, 2d ed., sec. 368. “Jurisdiction,” it has been said, “is of two kinds: 1. The power to hear and determine the particular matter, and to render some judgment thereon; and 2. The power to render the particular judgment which was rendered”: Ex parte Degener, 30 Tex. App. 366, 17 S. W. 1111.

When a court, having jurisdiction of a prisoner, denies to him a constitutional right or immunity, its jurisdiction ceases, and a judgment rendered in the case may be attacked on habeas corpus: Miskimins v. Shaver, 8 Wyo. 392, 58 Pac. 411; Nielsen, Petitioner, 131 U. S. 176, 9 Sup. Ct. Rep. 672. And the question of the authority of the court that adjudges a person guilty of a crime is open on habeas corpus: Ex parte Hollis, 59 Cal. 405. If the facts charged do not constitute a public offense or are not in contravention of any law, the prisoner should be released: Ex parte McNulty, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; Ex parte Neet, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025.

The opinion in Ex parte Hollis, 59 Cal. 405, 407, is instructive as showing how courts, while professing to make no inquiry beyond the jurisdiction of the committing court over the subject matter and of the parties, have gone further and investigated the authority of the court to render the particular judgment. We quote from the opinion: “Of course, where a court has jurisdiction of the subject matter and the parties, its judgment is not reversible on such

process. Being conclusive, courts cannot go behind it to ascertain whether any errors of law were committed in the proceedings in which it was rendered. But the judgment is not conclusive upon the question of the authority of the court that rendered it. That, as well as any other matter which would render the proceedings void, is always open to inquiry. It were a legal absurdity to say that a judgment, valid in form, precluded all inquiry into authority to render it.

"In *Ex parte Kearney*, 55 Cal. 212, this court went behind the judgment of the police court of San Francisco to determine whether the act of which the petitioner in that case was convicted was a criminal offense known to the law, and having reached the conclusion that it was not, we held the judgment of conviction absolutely void. As was said in that case: 'Whenever a court undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction.' Nearly a hundred years ago the author of Bacon's Abridgment thus expressed the same doctrine: 'If the commitment be against law, as being made by one who had no jurisdiction of the case, or for a matter for which by law no man ought to be punished, the courts are to discharge': 4 Bacon's Abridgment, tit. 'Habeas Corpus,' 585. So in *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, the supreme court, while holding part of a judgment of conviction conclusive, decided another part of the same judgment was in excess of the jurisdiction of the court that rendered it, and therefore void. 'Jurisdiction,' says the court, 'of the person of the prisoner and of the subject matter are not alone conclusive, but the jurisdiction of the court to render a particular judgment is a proper subject of inquiry; and while the court cannot, upon a return of the writ, go behind the judgment and inquire into alleged error and irregularity preceding it, the question is presented and must be determined, whether upon the whole record the judgment was warranted by law, and was within the jurisdiction of the court.'"

It should be observed, in this connection, that when jurisdiction depends upon litigated facts, an adjudication of the court that the requisite facts exist is conclusive evidence of jurisdiction until set aside in a direct proceeding, and cannot be contradicted upon a collateral attack: *Ex parte Sternes*, 77 Cal. 156, 11 Am. St. Rep. 251, 19 Pac. 275. A judgment of a court within its jurisdiction involving the adjudication of jurisdictional facts cannot be assailed by habeas corpus: *Bronk v. State* (Fla., July 13, 1901), 31 South. 248.

e. Constitutionality of Statutes and Ordinances.

1. **In General.**—"An unconstitutional law," said Mr. Justice Bradley in *Ex parte Siebold*, 100 U. S. 371, 376, "is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be

a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law, that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ."

The weight of authority now supports the above doctrine, to the effect that a court, on habeas corpus proceedings, may inquire into the constitutionality of the statute or ordinance under which the petitioner has been convicted and sentenced, and, if it proves to be unconstitutional, discharge him: *Henderson v. Heyward*, 109 Ga. 373, 77 Am. St. Rep. 384, 34 S. E. 590; *Moore v. Wheeler*, 109 Ga. 62, 35 S. E. 116; *Griffin v. Eaves* (Ga.), 39 S. E. 913; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *In re Gribben*, 5 Okla. 379, 47 Pac. 1074; *State v. Redmon*, 43 Minn. 250, 45 N. W. 232; *Ex parte O'Leary*, 65 Miss. 80, 7 Am. St. Rep. 640, 3 South. 144; *Ex parte Smith*, 135 Mo. 223, 58 Am. St. Rep. 576, 36 S. W. 628; *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218; *Ex parte Rosenblatt*, 19 Nev. 439, 3 Am. St. Rep. 901, 14 Pac. 298; *Ex parte Clamp*, 9 Ohio Dec. 672; *Ex parte Mato*, 19 Tex. App. 112; *Ex parte Rollins*, 80 Va. 314; *In re Wright*, 3 Wyo. 478, 31 Am. St. Rep. 94, 27 Pac. 565; *In re Tie Loy*, 26 Fed. 611; *Ex parte Siebold*, 100 U. S. 371.

"The underlying reason is that an unconstitutional act is no law at all, and that no court has a right to imprison a citizen who has violated no law of the state, but that such act, even if done by a court under the guise and form of law, is as subversive of the right of the citizen as if it was done by a person not clothed with authority, and hence it is the duty of this court, under section 3 of article 6 of the constitution, to discharge him by means of a writ of habeas corpus. This, too, irrespective of any other relief which may be available to him. For it is the very purpose of this writ to restore freedom to those who have been deprived of it without warrant or authority of law. Of course, it will be understood that habeas corpus will not be allowed to perform the functions of a writ of error or an appeal, but will only lie where the imprisonment is absolutely without authority of law or for an offense which has not been made an offense against the law, or where the act under which he is imprisoned is unconstitutional, and therefore is no law at all": *Ex parte Neet*, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025.

Some of the ablest courts, however, have arrived at a contrary conclusion, and have held that the constitutionality of a statute or ordinance is not a proper matter of investigation on habeas corpus. The reasons advanced for this doctrine are, that a judge or justice having jurisdiction to render judgment against an accused has jurisdiction to decide all questions involved in the case, including the constitutionality of the law or ordinance under which the prosecu-

tion is instituted; and not only has the court jurisdiction to decide this question, but it is its duty to pass upon the question when raised; and if the court decides the matter erroneously, still its judgment is not void. And then, moreover, the effect of granting writs in such cases is to allow the defendants in all convictions under ordinances and statutes, the validity of which may be questioned, to come directly to the supreme court by a proceeding in habeas corpus, instead of appealing or prosecuting writs of error: See *People v. Jonas*, 173 Ill. 316, 50 N. E. 1051; *Koepke v. People*, 157 Ind. 172, ante, p. 161, 60 N. E. 1039; *Platt v. Harrison*, 6 Iowa, 79, 71 Am. Dec. 389; *In re Underwood*, 30 Mich. 502, approved in *In re Maguire*, 114 Mich. 80, 72 N. W. 15; *Ex parte Fisher*, 6 Neb. 309; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261; *In re French*, 81 Wis. 597, 51 N. W. 960; *In re Schuster*, 82 Wis. 610, 52 N. W. 757. Compare *People v. Mallary*, 195 Ill. 582, 88 Am. St. Rep. —, 63 N. E. 508; *People v. Turner*, 55 Ill. 280, 8 Am. Rep. 645.

2. Amended Statutes.—If an attempted amendment to a statute is unconstitutional, but an offender is convicted under the original act, which is valid, he will not be discharged on habeas corpus: *Ex parte Davis*, 21 Fed. 396. Where a statute provides that if any person carnally knows a female under twelve years of age, he shall be guilty of rape, but an amendment is enacted raising the age of consent to sixteen years, and one is convicted under the law as amended on an information charging carnal abuse of a child under sixteen, he is not entitled to be released on habeas corpus, on the ground that the amendment is subsequently declared unconstitutional. And this, although he is without remedy in the courts by reason of having waived his right of appeal by failure to prosecute it within the time prescribed by statute. Had there been no statute defining the crime of rape and fixing the punishment therefor other than the unconstitutional act, the offender might have been entitled to his release. But the attempted amendment only being void, there existed a statute defining and punishing the crime. The trial court thus had jurisdiction of the accused and of the subject matter, and hence its judgment was conclusive against collateral attack: *In re Nolan*, 21 Wash. 395, 58 Pac. 222.

3. Moot Cases.—In *Ex parte Henlon* (Cal.), 55 Pac. 326, at the hearing of an application for habeas corpus, it was shown that the petitioner was not in fact suffering imprisonment, and that the case was in its nature a moot case, by which a speedy decision was sought upon the constitutionality of a certain ordinance. It was further shown that the alleged imprisonment would on that day come to an end, and the judgment be executed by lapse of time. It was held that habeas corpus could not be resorted to in such a case.

f. Repealed Statutes.—If one is indicted, convicted, and sentenced for an act made penal by a statute repealed prior to the date of the offense alleged to have been committed, he may be discharged

from custody by habeas corpus, if on the trial the question of the validity of such statute was not made and adjudicated against him. The court, in such case, has no jurisdiction to render the particular judgment: *Griffin v. Eaves* (Ga.), 39 S. E. 913. However, in *Ex parte Winston*, 9 Nev. 71, it is held that when the question as to whether the statute has been repealed is raised at the trial court and there decided against him, the decision cannot be reviewed in the supreme court on habeas corpus. The reason assigned for this rule is, that the court has jurisdiction to determine the matter as it has any other question presented, and an error in its judgment cannot be attacked collaterally. The supreme court of California has, on at least two occasions, inquired, in habeas corpus proceedings, as to whether the statute or ordinance under which the petitioner stood convicted had been repealed: See *Ex parte White*, 67 Cal. 102, 7 Pac. 186; *Ex parte Armstrong*, 84 Cal. 655, 24 Pac. 598. If courts, on habeas corpus proceedings, may inquire into the constitutionality of the statute under which the petitioner has been convicted and sentenced—and by the weight of authority they can (see “Constitutionality of Statutes,” *supra*)—then we fail to see any good reason why they may not with equal propriety inquire into the question of the repeal of the statute. In either case, if the determination is favorable to the petitioner, there is, in fact, no statute, no offense, and no judgment.

g. Validity of Elections—Local Option Laws.—The authorities do not seem entirely harmonious on the question of whether habeas corpus can be resorted to to test the legality of an election. In *Ex parte Rodriguez*, 39 Tex. 706, it is held that the constitutionality of a statute under which a general election is held may be determined in a proceeding on habeas corpus. And in *Ex parte Kramer*, 19 Tex. App. 123, it is held that the validity of an election at which a local option law is adopted may be attacked in this proceeding, on the ground that if the election is not conducted in accordance with the requirements of law, it is void and merely voidable, and all proceedings under and in virtue of the election are void and subject to collateral attack. On the other hand, it is decided in *Randall v. Tillis* (Fla.), 29 South. 540, and *Ex parte Mitchell*, 104 Mo. 121, 24 Am. St. Rep. 324, 16 S. W. 118, that one convicted of selling intoxicating liquors in violation of a local option law will not be discharged on habeas corpus on the ground that such law was not legally adopted, when that is a question for the determination of the trial court and reviewable by appeal.

h. Legal Existence of Court—De Facto Judge.—The title of a person acting with color of authority, even if he is not a good officer in point of law, cannot be attacked collaterally: *Ex parte Ward*, 173 U. S. 452, 19 Sup. Ct. Rep. 459. Where a court has jurisdiction of the offense and of the accused, and the proceedings are otherwise regular, a conviction is lawful, although the judge or justice holding the court may be only an officer *de facto*; and the validity

of the title of such officer to the office, or his right to exercise judicial functions, cannot be determined on a writ of habeas corpus: *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382, 62 Pac. 661; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *Patterson v. State*, 49 N. J. L. 326, 8 Atl. 305; *Ex parte Strang*, 21 Ohio St. 610; *Clark v. Commonwealth*, 29 Pa. St. 129; *In re Burke*, 76 Wis. 357, 45 N. W. 24; *Griffin's Case*, Chase's Dec. 364, Fed. Cas. No. 5815; *Ex parte Ward*, 173 U. S. 452, 19 Sup. Ct. Rep. 459. Though it is held that one deprived of his liberty under process issued on a final judgment by a court which he claims has no legal existence, may maintain habeas corpus: *In re Norton* (Kan.), 68 Pac. 639.

If a party is convicted and sentenced at a term of court held by a person exercising the office of judge of such court under an appointment by the governor made without authority of law, the sentence is nevertheless valid and binding as against collateral attack by habeas corpus: *State v. Bloom*, 17 Wis. 538. And the failure of a judge to subscribe to an oath of office as judge pro tempore does not render his judgments void. They are, at the most, voidable, but not by collateral attack: *In re Hewes*, 62 Kan. 288, 62 Pac. 673. In Georgia, any judge of the superior court of the state is competent to preside at the trial of any case in the superior court of any county; and the legality of a conviction had under such judge cannot be drawn in question on habeas corpus: *Daniels v. Towers*, 79 Ga. 785, 7 S. E. 120. Though a county seat may have been wrongfully removed, still long acquiescence in such removal will make the proceedings of a court de jure sitting at the place of removal valid, and forbid attacking by habeas corpus the regularity of the removal: *In re Allison*, 13 Colo. 525, 16 Am. St. Rep. 224, 22 Pac. 820.

It is decided in *In re Ah Lee*, 5 Fed. 899, that an unconstitutional statute is sufficient to give color of right or authority to an appointment to a judicial office, and that one imprisoned under a judgment of a judge appointed under an unconstitutional law is not thereby deprived of his liberty without due process of law. The writ of habeas corpus should, therefore, be denied him. To the same effect is *Ex parte Strang*, 21 Ohio St. 610. There are authorities, however, holding that the constitutionality of the statute creating a court is a proper matter of inquiry on a writ of habeas corpus by one sentenced by such court: See *Ex parte Pitts*, 35 Fla. 149, 17 South. 76; *Ex parte Snyder*, 64 Mo. 58. In this last case it is said that an officer de facto "necessarily presupposes an office which the law recognizes. And a quite extensive research has failed to discover an instance where an incumbent has been held an officer de facto unless there was a legal office to fill." In *In re Cloherty*, 2 Wash. 137, 27 Pac. 1064, the court inquire into the status of a police court, and, coming to the conclusion that it has no legal existence, release the petitioner. If the petitioner in habeas corpus claims that the statute creating the court wherein he was con-

victed is unconstitutional, the proceeding will be dismissed where he appeared in the court to which his case was certified and pleaded guilty: *In re Council* (Kan.), 59 Pac. 274.

i. **Plea of Former Jeopardy.**—The writ of habeas corpus cannot be resorted to for the purpose of discharging a petitioner on the ground of former jeopardy. Such plea must be presented and tried in the court having jurisdiction to try the offender on the charge for which he is convicted. If the decision of such court is thought erroneous, his remedy is by writ of error or appeal, and not by habeas corpus: *In re Terrill*, 58 Kan. 815, 49 Pac. 158; *Miller v. Case*, 7 Kan. App. 686, 51 Pac. 922; *State v. Klock*, 45 La. Ann. 316, 12 South. 307; *Ex parte Snyder*, 29 Mo. App. 256; *Ex parte Maxwell*, 11 Nev. 428; *Perry v. State*, 41 Tex. 488; *Pitner v. State*, 44 Tex. 578; *Ex parte Crofford*, 39 Tex. Cr. App. 547, 47 S. W. 533; *In re Barton*, 5 Utah, 264, 21 Pac. 998; *Steiner v. Nerton*, 6 Wash. 23, 32 Pac. 1063.

j. **Bastardy Proceedings.**—A judgment debtor in bastardy proceedings, who is imprisoned pursuant to the original judgment that he stand committed to the county jail until he gives bond for the payment of the judgment, will be discharged on habeas corpus, under a statute which does not authorize courts having jurisdiction of bastardy proceedings to enforce their judgments by imprisonment: *In re Comstock*, 10 Okla. 299, 61 Pac. 921. The failure to impanel a jury to try an issue in bastardy proceedings does not go to the jurisdiction of the court. At most it renders the judgment erroneous, the correction of which cannot be had by habeas corpus: *In re Walker*, 61 Neb. 803, 86 N. W. 510.

k. Contempt Proceedings.

1. **General Principles.**—When a court commits a party for contempt, its adjudication is a conviction, and its commitment an execution within the meaning of the law of habeas corpus: *Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234; *Phillips v. Welch*, 12 Nev. 158. The functions of the writ of habeas corpus, where the party who appeals to its aid is in custody under process for contempt, do not extend beyond an inquiry into the jurisdiction of the committing court, and the validity of the process upon its face: See the monographic note to *Mullin v. People*, 22 Am. St. Rep. 422. No more vital power exists in the exercise of the authority of courts than to punish for contempts, and habeas corpus will not be permitted to be so used as to interfere with the power and authority of courts to administer the law. One adjudged guilty of contempt and imprisoned therefor is not entitled to release upon habeas corpus, unless the proceedings under which he is imprisoned are void, because the court was without jurisdiction of the subject matter or the parties, or was wholly without power to make the order in the particular case which it did make: *In re Popejoy*, 26 Colo. 32, 77 Am.

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St. Rep. 222, 55 Pac. 1083; *Ex parte Keeler*, 45 S. C. 537, 55 Am. St. Rep. 785, 23 S. E. 865; *Ex parte Warfield*, 40 Tex. Cr. Rep. 413, 76 Am. St. Rep. 724, 50 S. W. 933. If a court has jurisdiction to hear and decide whether a party is guilty of contempt, and, if found guilty, to punish him for his conduct, its judgment of guilty in the exercise of such jurisdiction cannot be reviewed by habeas corpus: *In re Swan*, 150 U. S. 637, 14 Sup. Ct. Rep. 225; *Ex parte Davis*, 112 Fed. 139. But the court must not only have jurisdiction of the person and subject matter, but also authority to render the particular judgment: *Ex parte Warfield*, 40 Tex. Cr. Rep. 413, 76 Am. St. Rep. 724, 50 S. W. 933; *Ex parte Duncan* (Tex. Cr. App., April 24, 1901), 62 S. W. 758.

Mere errors and irregularities in the proceedings in contempt cannot be inquired into on habeas corpus. Neither can questions of wrong or injustice that may have been done the petitioner: *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380; *Fisher v. McDaniel*, 9 Wyo. 457, post, p. 000, 64 Pac. 1056. Habeas corpus cannot be used as a writ of error to review proceedings under which a party has been imprisoned for contempt of court: *In re Copenhaver*, 118 Mo. 377, 40 Am. St. Rep. 382, 24 S. W. 161.

On the other hand, if the court is without jurisdiction of the subject matter or of the parties, or lacks power to make the order in the particular case, it cannot punish for contempt or disobedience of such order; and habeas corpus may be invoked to avoid such imprisonment and restore the person illegally imprisoned to his liberty: *Ex parte Arnold*, 128 Mo. 256, 49 Am. St. Rep. 557, 30 S. W. 768, 1036; *In re Havlik*, 45 Neb. 747, 64 N. W. 234; *Ex parte Tinsley*, 37 Tex. Cr. Rep. 517, 66 Am. St. Rep. 818, 40 S. W. 306; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. Rep. 724; *Ex parte Perkins*, 29 Fed. 900. When a court undertakes to punish one for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. If the proceeding for contempt in such case results in imprisonment, the imprisonment is without authority of law, and the prisoner will be discharged on habeas corpus: *Ex parte Ayres*, 123 U. S. 443, 8 Sup. Ct. Rep. 164; *In re Reese*, 107 Fed. 942. A prisoner will be discharged if it appears upon the face of the judgment, or the record of the proceedings upon which the judgment is founded, that the judgment is upon a cause of contempt which the court has no statutory power to punish, or if it appears that the punishment inflicted is not within the power prescribed by statute for such cases: *State v. Galloway*, 5 Cold. 326, 98 Am. Dec. 404.

2. Illustrations.—A federal court may release on habeas corpus a party imprisoned for an alleged contempt in committing an act not forbidden by any order of court in existence at the time, but which the court subsequently attempted, in excess of its jurisdic-

tion, to forbid as of prior date by an order *nunc pro tunc*: *Ex parte Buskirk*, 72 Fed. 14. And habeas corpus is a proper remedy to secure a discharge from imprisonment for contempt in the violation of an injunction, on the ground that the prisoner, not being a party to the cause, was not subject to the jurisdiction of the court in the particular case, and that it had, therefore, no power to punish for the offense charged: *In re Reese*, 107 Fed. 942.

But one who has been adjudged insolvent in involuntary proceedings, and imprisoned for failure to appear and answer concerning his property, cannot be released upon habeas corpus on the ground that he has been discharged from his debts in subsequent voluntary proceedings: *In re Clarke*, 125 Cal. 388, 58 Pac. 22. In *Robb v. McDonald*, 29 Iowa, 330, 4 Am. Rep. 211, the plaintiff was subpoenaed to make his affidavit before a justice of the peace, but refusing to comply, he was committed by the justice, whereupon a writ of habeas corpus was obtained from the supreme court. It was held that he must remain in custody, although his affidavit could not be used in the proceeding for which it was required, on the ground that when a person is being punished for contempt, unless the proceedings leading thereto are so grossly defective as to render them void, the judgment of commitment cannot be reviewed by another tribunal. For further illustrations of the efficacy of habeas corpus to relieve from commitments for contempt, consult the monographic note to *Mullin v. People*, 22 Am. St. Rep. 422-425.

3. Facts or Evidence of Contempt.—The question of jurisdiction involves the inquiry whether the alleged conduct was in fact a contempt. The acts constituting the alleged contempt may be examined, on habeas corpus, to ascertain whether in law they constitute a contempt; and if they do not, the court was without jurisdiction to imprison, and the prisoner is entitled to be released: *Ex parte Senior*, 37 Fla. 1, 19 South. 652; *In re Dill*, 32 Kan. 668, 49 Am. Rep. 505, 5 Pac. 39; *In re Wood*, 82 Mich. 75, 81, 45 N. W. 1113; *Miskimins v. Shaver*, 8 Wyo. 392, 58 Pac. 411. In *Ex parte Irvine*, 74 Fed. 954, the petitioners were witnesses in a prosecution in which they refused to answer on the ground that the testimony sought would tend to incriminate. The court decided that their answers could not incriminate them, and committed them for contempt for their continued refusal to answer. On habeas corpus to the United States circuit court, Mr. Justice Taft, in considering how far the court might go behind the commitment and its recitals into the evidence and circumstances upon which the committing court acted, said: "It is clear that the decisions of the supreme court require this court to hold that, upon such a question as this, the testimony and facts upon which the court acted in committing the witness may and must be considered by the court before which the validity of the commitment is to be tested in a collateral way upon habeas corpus. . . . The duty of this court to examine into

the support of his divorced wife, it may imprison him for a violation of its order. His only remedy is to purge himself of such contempt, to the satisfaction of the court, that he is unable to obey the order, and that his inability has not been caused by his own act for the purpose of avoiding payment. When imprisoned for violation of such order, he is not entitled to his discharge on habeas corpus, if the court, finding him able to pay the allowance, has jurisdiction as shown by the record: *Ex parte Spencer*, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 393. He is not entitled to be discharged upon showing that since his imprisonment he has filed his petition in insolvency, and has obtained the usual preliminary order declaring him an insolvent: *Ex parte Wilson*, 73 Cal. 97, 14 Pac. 393. The regularity of the committal will not be reviewed if it is regular on its face: *In re Bissell*, 40 Mich. 63. And the action of the court in committing one for refusing to pay alimony pending a divorce cannot be reviewed by certiorari or habeas corpus, since the allowance is an appealable order, and such methods are an indirect attack thereon: *State v. Second Judicial Dist. Court*, 14 Mont. 396, 40 Pac. 66.

Where a husband is committed for contempt because of his failure to pay a judgment for the separate maintenance of his wife, upon habeas corpus proceedings, where the evidence on which the commitment is based is not before the court, it will be presumed that the court which issued the order of commitment found from the evidence that he had property with which to satisfy her judgment: *In re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222, 55 Pac. 1083.

II. Questions Concerning Preliminary Examination.

When, in a felony case, the defendant has been convicted and sentenced by a court of competent jurisdiction, he cannot, in habeas corpus proceedings, raise the objection that there was no preliminary examination: *Ex parte McConnell*, 83 Cal. 558, 23 Pac. 1119; *In re Ellis*, 79 Mich. 322, 44 N. W. 616. On the other hand, if the probable guilt of a felony has been duly ascertained by a preliminary hearing, the defendant cannot complain that the prosecution was by information instead of by indictment: *In re Dolph*, 17 Colo. 35, 28 Pac. 470. But see *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935.

III. Review of Indictments, Informations, and Affidavits.

a. *Legality of Grand Jury.*—In an application for a writ of habeas corpus the drawing, summoning, and impaneling of the grand jury that found the indictment under which the petitioner was convicted are not proper matters for consideration. Such questions are open to review only on appeal or writ of error: *In re Corcoran* (Idaho), 59 Pac. 18. This rule is observed, as to one indicted and held for trial, in *Ex parte Warris*, 28 Fla. 371, 9 South.

718; *In re McElroy* (Kan. App.), 58 Pac. 677; *In re Betts*, 36 Neb. 282, 54 N. W. 524.

The indictment returned by a grand jury impaneled by a *de facto* judge will not on that account be reviewed in habeas corpus proceedings: *State v. Fenderson*, 28 La. Ann. 82. Though it has been decided that a grand jury impaneled by a court having no authority to impanel a grand jury is an illegal body, and that an indictment found by it is a nullity. A person convicted and imprisoned under such an indictment is therefore illegally convicted and restrained of his liberty without due process of law, in violation of the laws and constitution of the United States. In such a case the writ of habeas corpus becomes a writ of right: *Ex parte Farley*, 40 Fed. 66.

A judgment of conviction cannot be attacked on habeas corpus on the ground that persons of the same race as the petitioner were excluded from the grand jury: *In re Shibuya Jugiro*, 140 U. S. 291, 297, 11 Sup. Ct. Rep. 770; *In re Wood*, 140 U. S. 278, 11 Sup. Ct. Rep. 738; nor because an alien who had declared his intention to become a citizen sat on the grand jury, under a law of the territory allowing it: *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. Rep. 780; nor because of a defect in the number of grand jurors: *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. Rep. 870; though it has been held otherwise if there was an excess in the number: *Ex parte Reynolds*, 35 Tex. Cr. Rep. 437, 60 Am. St. Rep. 54, 34 S. W. 120, overruling *Ex parte Fuller*, 19 Tex. Cr. App. 241.

b. Sufficiency of Indictment and Information.—Where the trial court acquired jurisdiction, the sufficiency of the indictment, information, or complaint will not ordinarily be inquired into on habeas corpus after a judgment of conviction: *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; *Matter of Eaton*, 27 Mich. 1; *In re Truman*, 44 Mo. 181; *Ex parte Harlan*, 1 Okla. 48, 27 Pac. 920; *In re Johnson*, 46 Fed. 477. A defect in the form of the indictment, by reason of a clerical omission, and which should have been raised on demurrer, cannot be made a ground for issuing a writ of habeas corpus after conviction and sentence: *In re Alcorn* (Idaho), 60 Pac. 561; nor can the fact that the indictment was not signed by the district attorney of the United States: *In re Lane*, 135 U. S. 443, 449, 10 Sup. Ct. Rep. 760; neither will the question as to whether the indictment, regular on its face, was ever found by a grand jury be inquired into: *Ex parte Twohig*, 13 Nev. 302.

c. Error Respecting Indictments.—Error in consolidating indictments, when the court has acted within its jurisdiction, cannot be inquired into on habeas corpus after conviction and sentence: *Howar v. United States*, 75 Fed. 986; *De Barba v. United States*, 99 Fed. 942. And on the indictment for the carnal knowledge of a female under sixteen years, which contains a charge of rape at common law, and also of the statutory offense, the failure of the court to compel the prosecuting attorney to elect upon which count he will

try the accused, and his treatment of the charge of rape as surplusage, is not such as can be taken advantage of on habeas corpus, the court having jurisdiction of both offenses: *In re Lane*, 135 U. S. 443, 10 Sup. Ct. Rep. 760. The general rule is, that error of the court in ruling on a question affecting an indictment, so long as it does not go to the jurisdiction, cannot be reviewed on habeas corpus after final judgment has been rendered: *Ex parte Clay*, 98 Mo. 578, 11 S. W. 998.

If an indictment or complaint is void, a conviction thereunder may be examined on habeas corpus, and the prisoner restored to freedom: *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; *Ex parte Reynolds*, 35 Tex. Cr. Rep. 437, 60 Am. St. Rep. 54, 24 S. W. 120; as when the facts charged do not constitute a public offense: *Ex parte Maler*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402.

No change, when an indictment is filed with the court, can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument as thus changed is no longer the indictment of the grand jury that presented it. A trial on such indictment is void, and the prisoner who stands sentenced thereon is entitled to his discharge on habeas corpus: *Ex parte Bain*, 121 U. S. 1, 7 Sup. Ct. Rep. 781.

d. **Necessity of Indictments.**—The prosecution of a felony by information, instead of by indictment, does not entitle the party convicted to his release on habeas corpus where the probable guilt of the accused has been duly ascertained and certified by a previous preliminary examination. Due process of law, in a prosecution for felony, does not necessarily include an indictment by a grand jury: *In re Dolph*, 17 Colo. 35, 28 Pac. 470. But one sentenced by a federal court to imprisonment for an infamous crime, without indictment or presentment by a grand jury, as required by the fifth amendment of the constitution, has been held to be entitled to his discharge on habeas corpus. A crime punishable by imprisonment for a term of years at hard labor is an infamous crime within the meaning of this amendment: *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935.

e. **Sufficiency of Affidavits.**—The sufficiency of the affidavit upon which a defendant is convicted before a justice of the peace cannot be raised on habeas corpus: *Ex parte Grubbs* (Miss., Nov. 25, 1901), 30 South. 708; *Pritchett v. Cox*, 154 Ind. 108, 56 N. E. 20. It is even held in *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. Rep. 658, 27 N. E. 152, that a judgment of conviction on an affidavit which does not charge a public offense does not entitle the defendant to be restored to his liberty on habeas corpus. The soundness of this doctrine may well be doubted, for in such a case one of the essentials of jurisdiction is, according to the weight of authority,

wanting, and the judgment is, for that reason, void: See *Ex parte Maler*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; and the subdivision of this note, "Jurisdictional Questions," ante. A person arrested in a civil action will not be discharged on habeas corpus because of a defect in the affidavit constituting only an error or irregularity: *Barton v. Saunders*, 16 Or. 51, 8 Am. St. Rep. 261, 16 Pac. 921.

IV. Review of Proceedings at the Trial.

a. **Time and Place of Trial.**—The conviction and sentence of an accused by a court held at a time or place other than that authorized or prescribed by law, are void, and the prisoner should be discharged on habeas corpus: *Ex parte Jones*, 27 Ark. 349; *In re Terrill*, 52 Kan. 29, 39 Am. St. Rep. 327, 34 Pac. 457. Where, during the trial of a criminal cause, and while the jury was in charge of the bailiffs deliberating of a verdict, the court was adjourned for two days, and the judge went to another county and held a term of court there, it was decided that the term terminated by operation of law, as to that cause, when the judge left the place where the court was by law required to be held, and went into another county and opened court there; that in his absence the jury had no authority to consider the case; that the jurisdiction, having been suspended by the dissolution of the court, could not be resumed by the return of the judge; and that a verdict returned in the case and a judgment thereon were void, and subject to collateral attack on habeas corpus: *In re Potzwald* (Okla., July 30, 1897), 50 Pac. 139. See, in this connection, *In re Millington*, 24 Kan. 214.

b. **Change of Venue.**—Error in overruling an application for a change of venue on the ground that an impartial trial cannot be had does not render the judgment of the judge or justice void, and will not be inquired into on habeas corpus: *Ex parte Wright*, 119 Cal. 401, 51 Pac. 639; *Ex parte Murphy*, 1 Okla. 288, 29 Pac. 652. See, also, *Peters v. Koepke*, 156 Ind. 35, 59 N. E. 33. And a petitioner will not be released on the ground that the crime for which he was convicted was committed at a place over which the trial court had no jurisdiction, when such fact is not made clearly to appear: *In re Terrill*, 58 Kan. 815, 49 Pac. 158.

c. **Presence and Arraignment of Accused.**—Where the accused is convicted and committed to imprisonment by a competent court, he will not be released on habeas corpus, because there was neither an arraignment nor plea asked or entered before proceeding with the trial: *Winslow v. Green*, 155 Ind. 368, 58 N. E. 259; nor because he was not present when the jury was impaneled and sworn, or during the trial, or when judgment was rendered against him: *Turney v. Barr*, 75 Iowa, 758, 38 N. W. 550; nor because of his enforced absence, in jail, when the verdict was received and the jury discharged: *Ex parte Farnham*, 3 Colo. 545.

d. Right to Counsel.—A person convicted and sentenced by a court of competent jurisdiction is not entitled to a discharge on habeas corpus on the ground of the alleged assignment of one as his counsel who, although he may have been an attorney at law, had not been admitted or qualified to practice as an attorney or counselor at law in the courts of the state in which the trial was had: *In re Shibuya Jugiro*, 140 U. S. 291, 297, 11 Sup. Ct. Rep. 770. In *Andersen v. Treat*, 172 U. S. 24, 19 Sup. Ct. Rep. 67, a petition for a writ of habeas corpus alleged that prior to his preliminary examination the petitioner employed an attorney, but that such counsel was denied permission to see and consult with him, and that he was not represented by counsel at the examination. The record showed that the petitioner waived examination; and that at his trial other counsel was assigned him, who represented him at the trial and in proceedings in error. It did not appear, nor was it alleged, that the court was requested to permit the alleged counsel of the petitioner to represent him. Under this state of facts, it was decided that the petitioner was not entitled to the writ on the ground of having been deprived of his constitutional right to counsel.

e. Jury Trial.

1. Refusal and Waiver of Jury.—The right of the accused to a jury trial, where the offense charged is not a felony, will not be considered in habeas corpus proceedings, where a judgment of conviction is rendered by a competent court. And this, though the defendant demands a jury and his demand is refused. The failure to impanel a jury to try the issue does not go to the jurisdiction of the court, but, at most, can render the judgment merely erroneous: *Ex parte Brandon*, 49 Ark. 143, 4 S. W. 452; *Ex parte Miller*, 82 Cal. 454, 22 Pac. 1113; *In re Fife*, 110 Cal. 8, 42 Pac. 299; *Williams v. Hert*, 157 Ind. 211, post, p. 203, 60 N. E. 1067; *In re Walker*, 61 Neb. 803, 86 N. W. 510. See, also, *Zelle v. McHenry*, 51 Iowa, 572, 2 N. W. 264.

In felony cases the law is not so clear. In Indiana, a judgment of conviction, upon a plea of guilty of murder in the first degree and the fixing of the punishment without the intervention of a jury, are not errors going to the jurisdiction of the court, and hence not open to attack on habeas corpus: *Lowery v. Howard*, 103 Ind. 440, 3 N. E. 124. In *In re Staff*, 63 Wis. 285, 53 Am. Rep. 285, 23 N. W. 587, a party accused of larceny waived his right to a jury trial, and, on his conviction and sentence by the court, the legality of his confinement was inquired into on habeas corpus. In this proceeding, it was determined that the defendant effectually waived his right to a jury, and was properly tried by the court. Hence, he was remanded to prison. This case clearly recognizes that the competency of the accused to waive a jury trial, and the legality of his conviction in case of such waiver, may be tested in habeas corpus proceedings. In the course of the opinion it is said: "It is now

claimed on his behalf that it was not competent for him to waive a jury trial, and hence that his conviction was illegal and void, and the court had no jurisdiction to proceed thereon to judgment and sentence. If the prisoner could not effectually waive a trial by jury, the court had no jurisdiction to try him, and the conclusion seems undeniable that the judgment would, in that event, be entirely void. Hence, upon the petitioner's theory of the case, habeas corpus is the proper remedy. . . . Failing the jurisdiction of the court to try and convict the accused without a jury, the court exceeded its jurisdiction as to subject matter and person, and its judgment and process of commitment, although in proper form, were issued in a case not allowed by law. Such alleged excess or want of jurisdiction may be inquired into on habeas corpus, and if found to exist is ground for a discharge of the accused."

2. Legality of Jury.—The contention that a conviction of a misdemeanor was based on the verdict of a jury not sworn cannot be raised on habeas corpus: *Ex parte English* (Tex. Cr. App.), 53 S. W. 106. Neither can the fact that, in a capital case, the accused exhausted his peremptory challenges and the court overruled his challenges for cause, so that, as he alleges, he was deprived of a trial by an impartial jury: *In re Schneider*, 148 U. S. 162, 13 Sup. Ct. Rep. 572. Nor can the contention that persons of the same race as the petitioner were excluded from the jury: *In re Wood*, 140 U. S. 278, 11 Sup. Ct. Rep. 738; *In re Shibuya Jugiro*, 140 U. S. 291, 11 Sup. Ct. Rep. 770. It is decided in *Scott v. State*, 70 Miss. 247, 35 Am. St. Rep. 649, 11 South. 657, that if from the record it appears that the defendant was convicted by a jury of eleven persons only, the verdict and judgment must be treated void on habeas corpus. The alleged misconduct of the jury cannot be reviewed in a federal court on habeas corpus, when the question has been determined in the trial court and the supreme court of the state: *In re King*, 51 Fed. 434.

f. Witnesses—Compulsory Process.—One convicted and sentenced by a competent court cannot claim his discharge on habeas corpus on the alleged ground that the court refused him time to get his witnesses: *In re Ellis*, 79 Mich. 322, 44 N. W. 616; nor on the ground that he was denied compulsory process for obtaining witnesses in his favor: *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. Rep. 780.

g. Informing Party of Rights.—A prisoner cannot raise the contention on habeas corpus that the commitment under which he is held is void because it does not appear therefrom that he was informed of all his rights: *Ex parte Ah Sam*, 83 Cal. 620, 24 Pac. 276; and the failure of a justice of the peace to inform the defendant of his right of appeal, as required by statute, does not render the judgment of conviction against him void, and entitle him to his

discharge on habeas corpus: *Jacoby v. Waddell*, 61 Iowa, 247, 16 N. W. 119.

V. Review of the Verdict.

a. Sufficiency of Verdict.—It is within the jurisdiction of the trial judge to pass upon the sufficiency and legal meaning of a verdict, and if he errs in so doing, it is an error in the exercise of his jurisdiction, and not presenting a jurisdictional defect remediable by habeas corpus: *State v. Sloan*, 65 Wis. 647, 650, 27 N. W. 616; *In re Eckart*, 166 U. S. 481, 17 Sup. Ct. Rep. 638. Thus, a verdict of guilty in a prosecution for murder not finding the degree of the homicide, will, on habeas corpus, support a judgment of conviction: *Dover v. State*, 75 Ala. 40; *In re Eckart*, 166 U. S. 481, 17 Sup. Ct. Rep. 638, affirming *In re Eckart*, 85 Wis. 681, 56 N. W. 375. In the record of a general conviction on two counts, one of which is good, a misrecital of the verdict as upon the other count only in stating the inquiry whether the accused had anything to say why sentence should not be pronounced, is no ground for his discharge on habeas corpus: *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935. And if a verdict is not the result of deliberation by the jury, but is prepared by the court and signed by a juror as foreman, and no opportunity is given the jurors to assent or dissent therefrom, the remedy of the accused is not by habeas corpus: *Turney v. Barr*, 75 Iowa, 758, 38 N. W. 550.

b. Force and Effect of Evidence.—Where a final judgment of conviction is rendered by a court of competent jurisdiction, errors in the force and effect given testimony cannot be reviewed collaterally or corrected on habeas corpus: *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382, 62 Pac. 661. The evidence introduced on the trial cannot be reviewed by the court issuing the writ, for the purpose of determining its sufficiency to support the conviction: *Ex parte Long*, 114 Cal. 159, 45 Pac. 1057; *In re Lewis*, 124 Mich. 199, 82 N. W. 816; *State v. Norby*, 69 Minn. 451, 72 N. W. 703; *In re Langston*, 55 Neb. 310, 75 N. W. 828. It is not permissible to go behind the judgment, and show, by proof addressed to the merits of the cause, that the defendant was improperly convicted: *Benson v. State*, 124 Ala. 92, 27 South. 1. A contention that the verdict is void because contrary to the decision of the trial court that the evidence was insufficient, is tantamount to the assertion that the verdict and judgment are void because the verdict is contrary to the evidence and instructions of the court. The remedy in such case is not by habeas corpus: *In re Thompson*, 9 Mont. 381, 23 Pac. 933.

VI. Review of the Judgment and Sentence.

a. Defective Judgments and Sentences, Generally.—A mere irregularity or informality in a judgment or sentence of conviction cannot be assailed on habeas corpus. Thus, a judgment of conviction not stating the particular offense of which the defendant is con-

victed (*Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *People v. Cavanagh*, 2 Park. C. Rep. 660), a judgment of conviction of a misdemeanor imposing a fine, which omits to order the issuance of execution for the fine and costs (*Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076), and a judgment of conviction of a felony which omits expressly to adjudge the defendant's guilt (*Ex parte Robertson*, 123 Ala. 103, 82 Am. St. Rep. 107, 26 South. 645), are not subject to a collateral attack on habeas corpus. A misnomer in the entry of a sentence by the clerk in the minutes of the court, the entry being otherwise properly entitled, and showing the defendant was found guilty and his penalty assessed by the jury, does not entitle him to his discharge: *Ex parte Beeler* (Tex. Cr. App.), 53 S. W. 857. Neither does the entry of a judgment which is meaningless: *Ex parte Walker*, 132 Cal. 143, 64 Pac. 135; nor does a slip or misprision of the clerk in recording the sentence: *Commonwealth v. Wright*, 126 Pa. St. 464, 17 Atl. 620.

Where one is held under a valid judgment, as well as an invalid one, he is not entitled to be discharged on habeas corpus, at least until the valid judgment has expired: *Ex parte Gibson*, 89 Ala. 174, 7 South. 833. Where a sentence is severable, one part being authorized and the other not, the prisoner will not be discharged until the legal part of the sentence is served: *People v. Baker*, 89 N. Y. 460; *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59.

If a defendant is properly convicted, but there is error in the sentence rendering it void, the defendant should be discharged on habeas corpus. And he cannot be detained on the ground that the process on which he is committed is a justification to the office serving it: *In re Harris*, 68 Vt. 243, 35 Atl. 55. A court not having jurisdiction of a major offense cannot carve out of it one of less grade. If it attempts to, the defendant, after conviction, may be discharged on habeas corpus: *Ex parte Brown*, 40 Fed. 81.

b. Parties Brought from Other Jurisdictions.—When a party has been convicted and sentenced by a competent court, he cannot, in habeas corpus proceedings, raise the objection that he was illegally arrested in, or abducted from, another state: *In re Ellis*, 79 Mich. 322, 44 N. W. 616; *Kingen v. Kelley*, 3 Wyo. 566, 28 Pac. 36. There has been considerable conflict in the decided cases as to whether a person extradited for one offense could be tried for a different one. The question is apparently put to rest, however, by the case of *Lascelles v. Georgia*, 148 U. S. 537, 13 Sup. Ct. Rep. 687. This case lays down the doctrine that a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than those for which he was rendered up; but may, after being restored to the demanding state, be lawfully tried and punished for any and all crimes committed within its territorial jurisdiction, either before or after jurisdiction. No question of habeas corpus was here involved. However, it is decided in *Ex parte Skiles*, 50 Fed. 524, that an offender

extradited from another state to answer an indictment, and convicted of an offense other than the one alleged therein, cannot invoke the aid of a federal court by habeas corpus. A federal court will not, on habeas corpus, investigate the legality of a prisoner's extradition after his trial and conviction in a state court: *Eaton v. West Virginia*, 91 Fed. 760.

c. **Place of Incarceration.**—The place of imprisonment is no part of the judgment, and it is ordinarily held that an error in the sentence in designating such place does not entitle the prisoner to his release on habeas corpus: *Ex parte Simmons*, 62 Ala. 416; *Ex parte Waterman*, 33 Fed. 29; as when he is sentenced to the state prison instead of in the penitentiary or county jail: *People v. Kelly*, 32 Hun, 536; or when he is sentenced to the penitentiary for an offense not punishable by imprisonment there: *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20; or when sentenced to hard labor for the county where he should have been sentenced to the penitentiary: *Kirby v. State*, 62 Ala. 51. And when one is sentenced to the state prison when he should have been sentenced to the county jail or penitentiary, it has been held that, though the sentence may be void, still if the conviction is valid, he should not be discharged, but remanded to the custody of the sheriff for the trial court to deal with according to law: *People v. Kelly*, 97 N. Y. 212. This principle is recognized in *In re Harris*, 68 Vt. 243, 35 Atl. 55, where the offender was sentenced to the state prison instead of to the house of correction. In the course of the opinion it is said: "The record before us shows that the petitioner was properly convicted. The error was in the sentence, and there does not seem to be any good reason why jurisdiction of the petitioner should not be re-assumed by the court in which he was convicted, that he may be properly sentenced. To prevent the defeat of justice, we may well remand the petitioner to the custody of the sheriff of Caledonia county that he may be taken before the county court, and sentence properly imposed." But in *Ex parte Moon Fook*, 72 Cal. 10, 12 Pac. 803, one sentenced to the house of correction, when he was not one of the class of criminals who, under the statute, might be committed to that institution, was released on habeas corpus.

Where a prisoner sentenced to the penitentiary is taken to the county jail, and while there sues out a writ of error and obtains a supersedeas and an order for release on bail, and fails to furnish bail, he is not entitled to his discharge on the ground that his offense is punishable by imprisonment in the county jail only, and his sentence is for that reason illegal, since the supersedeas relieves him from imprisonment in the penitentiary: *In re Farrell*, 22 Colo. 461, 45 Pac. 428.

The omission to state, in the record of a judgment of a district court of the United States sentencing a person to imprisonment in another state, that there is no suitable prison in the state where he is convicted, and that the attorney general has designated the

prison of the other state as a suitable place of incarceration, constitutes no ground for discharging the prisoner on habeas corpus: *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. Rep. 935.

The supreme court of Oklahoma has no original jurisdiction over prisoners sentenced from Oklahoma and confined in the Kansas state penitentiary, pursuant to statute, and a writ of habeas corpus will not issue to the warden of such penitentiary to inquire into the validity of a sentence of persons while there confined: *In re Bailey*, 10 Okla. 294, 61 Pac. 922. The fact that a penitentiary over which the territory of Arizona claims and exercises jurisdiction is alleged to be within the state of California cannot be made the ground for a writ of habeas corpus to release one confined therein under the sentence of an Arizona court. A boundary dispute cannot be determined in this manner. Moreover, territories are authorized by an act of Congress to provide for maintaining their convicts in the prisons of other states: *In re Chavez*, 72 Fed. 1006.

d. **Premature Sentence.**—It is sometimes averred in the petition in habeas corpus proceedings that there was no interval of time between the plea and the sentence, but that the one followed immediately after the other, or that the interval was shorter than the one prescribed by statute. It is held, however, that a sentence too soon after conviction is a mere irregularity, and not an excess of jurisdiction entitling the prisoner to his discharge: *Ex parte Ah Sam*, 83 Cal. 620, 24 Pac. 276; *In re Smith*, 2 Nev. 338; *In re Barton*, 6 Utah, 264, 21 Pac. 998.

e. **Delay in Execution.**—In Alabama, an unreasonable delay in executing a sentence will entitle the prisoner to his discharge on habeas corpus: *Ex parte Goucher*, 103 Ala. 305, 15 South. 601; as where he is sentenced to hard labor for the county, and is detained in jail twenty-two days after sentence, without sufficient excuse or explanation: *Ex parte Rand*, 99 Ala. 302, 14 South. 540. It is otherwise, however, when the delay in the execution is due to proceedings instituted by the convict himself: *Ex parte Espalla*, 109 Ala. 92, 19 South. 984. In a recent California case, one undergoing imprisonment in the county jail for a misdemeanor was sentenced to the state prison for a felony. This latter sentence was not carried into effect, but the imprisonment for the misdemeanor was continued in the county jail. It was decided that his continued incarceration in the county jail after his sentence to the state prison was unlawful, but that he was entitled to the writ of habeas corpus only so far as was necessary to secure him his right to be placed in the proper custody. He was, therefore, remanded to the custody of the sheriff to be delivered to the warden of the state prison: *Ex parte McGuire*, 135 Cal. 339, ante, p. 105, 67 Pac. 327.

f. Indefinite Sentence.—Indefiniteness as to the time or extent of a commitment for contempt does not ordinarily entitle the prisoner to release on habeas corpus: *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374. But it has been held that a commitment for contempt under a process stating no definite time of imprisonment entitles the party to his discharge, though it would be otherwise if he had been committed until he should perform some act: *People v. Pirfenbrink*, 96 Ill. 68; *Matter of Hammel*, 9 R. I. 248. The validity of a judgment sentencing the defendant to imprisonment until his fine is paid, or until his fine and the costs of the prosecution are paid, cannot ordinarily be questioned on habeas corpus, on the ground of indefiniteness: *Ex parte Bryant*, 24 Fla. 278, 12 Am. St. Rep. 200, 4 South. 854; *People v. Foster*, 104 Ill. 156; *Elsner v. Shrigley*, 80 Iowa, 30, 45 N. W. 393; *Matter of Johnson*, 104 Mich. 343, 62 N. W. 407; *In re McDonald*, 4 Wyo. 150, 33 Pac. 18. But it is held that a commitment for a year, unless the fine is sooner paid, under a statute permitting imprisonment until the fine is paid, is open to attack: *Ex parte Marx*, 86 Va. 40, 9 S. E. 475. A sentence which states the period of duration and the place of confinement is not void because it fails to fix the time for the imprisonment to commence, and hence cannot be assailed on habeas corpus: *Ex parte Gafford*, 25 Nev. 101, 83 Am. St. Rep. 568, 57 Pac. 484.

g. Extent of Punishment.

1. The General Rule is that where the court has jurisdiction in a criminal case and errs merely in regard to the punishment, relief will not be granted by habeas corpus; but the remedy is by appeal or writ of error, in which the mistake can be corrected and such sentence pronounced as should have been imposed: *Stalker, Petitioner*, 167 Mass. 11, 44 N. E. 1068; *In re Bishop*, 172 Mass. 35, 51 N. E. 191; *In re Schenck*, 74 N. C. 607; *Ex parte Bond*, 9 S. C. 80, 30 Am. Rep. 20.

2. Excessive Sentence.—When a court of competent jurisdiction imposes an excessive sentence—that is, imposes a greater punishment than is authorized by law—there are authorities holding that the whole sentence is void ab initio, and that the prisoner is entitled to his discharge on habeas corpus. But with perhaps a majority of the courts, such judgment is valid to the extent to which the law allowed it to be entered, and void only for the excess. The prevailing rule is, that an excessive sentence is not illegal because of the excess; that it is not void ab initio; and that it is good on habeas corpus, so far as the power of the court extends, and invalid only as to the excess. Prior to the expiration of that part of the sentence that the court could legally impose, the prisoner will not, according to the more recent decisions and the better doctrine, be discharged in habeas corpus on the ground that the sentence is excessive: *In re Fanton*, 55 Neb. 703, 70 Am. St.

Rep. 418, 76 N. W. 447; *In re Taylor*, 7 S. Dak. 382, 58 Am. St. Rep. 843, 64 N. W. 253; *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. Rep. 746; *De Bara v. United States*, 99 Fed. 942; *Church on Habeas Corpus*, 2d ed., sec. 373; monographic note to *State v. Klock*, 55 Am. St. Rep. 267-274. Consult this note for the qualifications and illustrations of this rule.

3. Deficient Sentence.—If the court in pronouncing sentence does not follow the law, but imposes a punishment less than that prescribed for the offense of which the accused stands convicted, the sentence is usually considered erroneous only. Such a sentence, while not warranted by law, is not, by the weight of authority, void. It cannot, therefore, be successfully attacked on habeas corpus: *State v. Klock*, 48 La. Ann. 67, 55 Am. St. Rep. 259, 18 South. 957; *In re Williams*, 39 Minn. 172, 39 N. W. 65; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; monographic note to *State v. Klock*, 55 Am. St. Rep. 264-267. In *Stalker, Petitioner*, 167 Mass. 11, 44 N. E. 1068, the petitioner had been sentenced to hard labor, and on habeas corpus contended that there was error in his sentence because it did not include solitary confinement. But Holmes, J., in giving the opinion of the court, said: "The prisoner's sentence is correct as far as it goes; he has suffered nothing that is inconsistent with the further penalty which he says ought to be imposed upon him, and there is nothing to hinder that being added before his term expires."

h. Cumulative and Concurrent Sentences.—A cumulative sentence is a sentence making one term of imprisonment to commence on the expiration of another. Such a sentence, if regular and definite, is valid, and not open to attack on habeas corpus: *People v. Forbes*, 22 Cal. 135; *Ex parte Durbin*, 102 Mo. 100, 14 S. W. 821; *Ex parte Cox*, 29 Tex. App. 84, 14 S. W. 396; *In re Esmond*, 42 Fed. 827. If a prisoner is convicted on the same day under two separate indictments, and is separately sentenced under each, the terms of imprisonment are not concurrent, but one begins when the other ends, and he is not entitled to be discharged until both have expired: *Ex parte Turner*, 45 Mo. 331. See, too, *Ex parte Kirby*, 76 Cal. 514, 18 Pac. 655.

Where the defendant was tried on an indictment containing many counts, each charging a different misdemeanor of the same kind, and a verdict of guilty on twelve counts was returned, and a separate sentence to the full extent of the law for a misdemeanor of the grade charged was imposed on each count, it was decided that the sentence on a single offense was good, that the further sentences were in excess of the jurisdiction of the court and void, and the prisoner, after the execution of one sentence, was entitled to his discharge on habeas corpus: *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211. And where a person was sentenced to the state prison for one year, to commence upon the expiration of an-

other term, and one year afterward the first sentence and judgment were adjudged void, it was decided on habeas corpus that the sentence either commenced to run immediately on rendition and had expired, or it was void for uncertainty, and in either case the prisoner was entitled to be released: *Ex parte Roberts*, 9 Nev. 44, 16 Am. Rep. 1.

i. **Joint Sentences.**—When a court has jurisdiction to try two or more defendants upon a joint indictment for the same public offense, a joint sentence of such defendants is not void, however erroneous it may be. And whether erroneous or not cannot be determined on habeas corpus: *Ex parte Gafford*, 25 Nev. 101, 83 Am. St. Rep. 568, 57 Pac. 484.

j. **Modified Sentences.**—It has been decided on habeas corpus that a judge has power to revise and increase a sentence imposed upon a convict, during the same term of court, and before the original sentence has gone into operation or any action has been taken on it: *Commonwealth v. Weymouth*, 2 Allen, 144, 79 Am. Dec. 776. But after he has been committed to jail on a warrant of commitment, in pursuance of a legal sentence, the judge cannot revise and increase it, although the punishment imposed by the latter sentence is within the limit fixed by law: *Brown v. Rice*, 57 Me. 55, 2 Am. Rep. 11. And where a convict has suffered punishment according to a legal sentence a second judgment, even in the same term, is void, and he will be discharged from imprisonment under it on habeas corpus: *People v. Whitson*, 74 Ill. 20.

Ex parte Lange, 18 Wall. 163, is the leading case on the power of a court to alter its judgment after the prisoner has suffered part of the punishment thereunder. *Lange* was sentenced to one year's imprisonment and fine, when the law permitted only one year's imprisonment or a fine. He was committed to jail in execution of his sentence, and the next day after commitment he paid his fine. Some days afterward, during the same term, he was brought into court and an order was made vacating the former judgment, and he was sentenced to imprisonment for one year from that date. On habeas corpus the second sentence was held to be a nullity, on the ground that while the first sentence was irregular it was not void, and the prisoner having suffered part of the imprisonment and paid the fine, the second sentence was, in effect, a punishment of the offender twice for the same offense. He was restored to his liberty.

k. **Fine and Imprisonment.**—A mere irregularity imposing a fine does not entitle the defendant to the remedy of habeas corpus: *In re Sloan*, 5 N. Mex. 590, 25 Pac. 930; and where the statute prescribes the penalty for an offense as a fine and imprisonment, the omission to impose the fine is only an irregularity: *State v. Klock*, 48 La. Ann. 67, 55 Am. St. Rep. 259, 18 South. 95. But an imprisonment for the nonpayment of a fine, under a statute giving

no specific authority therefor, entitles the prisoner to the remedy: *People v. Stock*, 50 N. Y. Supp. 483, 26 App. Div. 564, affirmed in 157 N. Y. 681, 51 N. E. 1092. So a party is entitled to the writ when the court has imposed a fine and imprisonment, where it had power only to impose a fine or imprisonment, and the fine has been paid: *Ex parte Lange*, 18 Wall. 163. But he is not entitled to his discharge, until he has paid the fine or served the imprisonment: *Ex parte Davis*, 112 Fed. 139. See, in this connection, *In re Christian*, 82 Fed. 199, 203.

If a defendant is imprisoned to enforce the payment of costs adjudged against him in a proceeding to prevent the commission of an offense, the court having no authority to order such imprisonment, he may invoke the writ of habeas corpus: *In re Mitchell*, 39 Kan. 762, 19 Pac. 1. And where a jury on the acquittal of the defendant, finds, without authority, that the complaint was malicious and without probable cause, a judgment on such verdict that the complaining witness pay the costs and stand committed to the county jail until payment, may be attacked on habeas corpus: *In re Permstick*, 3 Wash. 672, 28 Am. St. Rep. 80, 29 Pac. 350.

A judgment to be imprisoned or to pay a fine is not open to attack because in the disjunctive: *People v. Schantz*, 13 Misc. Rep. 563, 34 N. Y. Supp. 1099. If a sentence of fine or imprisonment is imposed, the better practice is for the judge to fix some reasonable time within which the fine may be paid. If this is not done the prisoner is entitled to a reasonable time in which to pay; and if the fine is paid within a reasonable time, and accepted by an officer having authority, the prisoner will be released on habeas corpus: *Broomhead v. Chisolm*, 47 Ga. 390. A prisoner confined in the state prison, in California, after he has served his term and is being held in order to collect a fine imposed as a part of the sentence, will be liberated on habeas corpus: *Ex parte Arras*, 78 Cal. 304, 20 Pac. 683; *Ex parte Wadleigh*, 82 Cal. 518, 23 Pac. 190. The writ does not lie, in Texas, as a means of forcing a county judge to hire out a convict for the purpose of paying his fine: *Thompson v. State*, 32 Tex. Cr. Rep. 274, 22 S. W. 876.

1. **Defective Mittimus.**—An imprisonment rests upon the judgment, and the mittimus is important only as a direction to the officer, and as evidence of the authority which the judgment gives: *Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344, 16 N. E. 448; *People v. Baker*, 89 N. Y. 460. Imperfections, informalities, and errors in the mittimus, therefore, afford no ground for the discharge of the prisoner on habeas corpus: *In re Waldrip*, 1 Ariz. 482, 2 Pac. 751; *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546; *Ex parte Keil*, 85 Cal. 309, 24 Pac. 742; *Jackson v. Boyd*, 53 Iowa, 536, 5 N. W. 734; *Sennott's Case*, 146 Mass. 489, 4 Am. St. Rep. 344, 16 N. E. 448; *In re Lewis*, 124 Mich. 199, 82 N. W. 816; *People v. McEwen*, 67 How. Pr. 105. "A prisoner who has been properly and legally sentenced to prison cannot be released simply because

there is an imperfection in what is commonly called the mittimus. A proper mittimus can, if needed, be supplied at any time, and if the prisoner is safely in the proper custody, there is no office for a mittimus to perform": *People v. Baker*, 89 N. Y. 460. A defective mittimus may be amended even after habeas corpus is brought: *Kelley v. Thomas*, 15 Gray, 192.

It is the duty of the court to release a person held in prison on a void process of commitment, so far as that process is concerned; but if there is a valid judgment of imprisonment against him, of which a certified copy can be obtained, it is the duty of the court, when brought before it by habeas corpus, to retain the prisoner until a reasonable time allowed for the purpose of producing it has elapsed, and if produced, to remand him: *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546.

VII. Review of Proceedings of and by Particular Courts.

a. Inferior Courts.

1. In General.—The judgment of an inferior court, such as a police court, mayors, magistrates, or justices, having jurisdiction conferred by law to try and dispose of a criminal case, is as conclusive and rests upon the same basis, when the jurisdiction has attached, as the adjudication of any other common-law court. No mere errors and irregularities in the proceedings or in the judgment and sentence will render the judgment void and vulnerable to collateral attack on habeas corpus. The writ of habeas corpus is not a revisory remedy, and cannot be made to answer the purposes of an appeal, certiorari, or writ of error in this class of cases: *Ex parte Gayles*, 108 Ala. 514, 19 South. 12; *Ex parte Bizzell*, 112 Ala. 210, 21 South. 371; *Turner v. Conkey*, 132 Ind. 248, 32 Am. St. Rep. 251, 31 N. E. 777; *Peters v. Koepke*, 156 Ind. 35, 59 N. E. 33; *Platt v. Harrison*, 6 Iowa, 79, 71 Am. Dec. 389; *People v. Hagan*, 54 N. Y. Supp. 826, 25 Misc. Rep. 125.

2. Justice's Court.—The judgment and sentence of a justice of the peace in a criminal case, if the justice has jurisdiction of the person of the defendant and of the subject matter, and power to render the judgment in the particular case is not open to attack on habeas corpus. Irregularities in the proceedings not going to the jurisdiction and not making the judgment or sentence void, are not a proper subject of inquiry: *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. Rep. 658, 27 N. E. 152; *Turner v. Conkey*, 132 Ind. 248, 32 Am. St. Rep. 251, 31 N. E. 777; *Adams v. Vose*, 1 Gray, 51; *Ex parte Edgington*, 10 Nev. 215; *In re Casey* (Wash.), 68 Pac. 185. Formal errors in the proceedings will not authorize the discharge of the petitioner: *Pritchett v. Cox*, 154 Ind. 108, 56 N. E. 20. The fact that the judgment is loose and informal does not subject it to revision on habeas corpus: *Ex parte Gayles*, 108 Ala. 514, 19 South. 12. The writ will not lie to test the sufficiency of an affidavit charging the crime on which the defendant was convicted:

Ex parte Grubs (Miss.), 30 South. 708; nor to review the discretion of a justice in committing one convicted of intoxication for not making a full and fair disclosure as to where and from whom he obtained the intoxicants, there being a statute permitting a commitment under such circumstances: In re Carpenter, 71 Vt. 91, 41 Atl. 1042; nor to discharge him because he is erroneously ordered to pay his fine to the state: Phinney, Petitioner, 32 Me. 440.

If, however, a justice of the peace exceeds his jurisdiction in passing judgment or pronouncing the sentence, the same is void, and habeas corpus is a proper remedy for freedom from an imprisonment that may be imposed thereunder: Ex parte McKivett, 55 Ala. 236; In re Long, 87 Ala. 46, 6 South. 328.

3. **Police Courts and Magistrates.**—A judgment or sentence of a police court cannot be assailed on habeas corpus for irregularities or errors in the proceedings not rendering it void: Peters v. Koepke, 156 Ind. 35, 59 N. E. 33; Platt v. Harrison, 6 Iowa, 79, 71 Am. Dec. 389; In re Corum, 62 Kan. 661, 84 Am. St. Rep. 382, 62 Pac. 271. And so where it appears that the relator is detained by virtue of a judgment of conviction by a magistrate having jurisdiction and authority to impose the punishment inflicted, the writ must be dismissed: People v. Hagan, 54 N. Y. Supp. 826, 25 Misc. Rep. 125; People v. Fox, 69 N. Y. Supp. 545, 34 Misc. Rep. 82, 15 N. Y. Cr. Rep. 373. The court will not review the conviction of a magistrate, if he had jurisdiction of the charge and authority to impose the sentence: People v. Flynn, 74 N. Y. Supp. 740, 37 Misc. Rep. 90; People v. Superintendent of New York State Reformatory, 74 N. Y. Supp. 752, 37 Misc. Rep. 92. The prisoner may be released, however, when it appears on the face of the proceedings that the magistrate had no jurisdiction: Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381.

4. **Mayor's Court.**—A judgment of conviction, by a mayor or mayor's court, of an offense of which the court has jurisdiction, cannot be assailed on habeas corpus for irregularities in the progress of the trial or in the proceedings preliminary thereto. Such judgment, when jurisdiction has attached, is conclusive in a collateral proceeding: In re Knox, 64 Ala. 463; Ex parte Bizzell, 112 Ala. 210, 21 South. 371; Ex parte Brandon, 49 Ark. 143, 4 S. W. 452.

b. State Courts.

1. **Judgments of Sister State.**—If, owing to the topography of the country, convicted prisoners cannot well be conveyed from the place of their conviction to the penitentiary without passing through another state, they are not entitled, while passing through the latter state in the custody of an officer, to writs of habeas corpus, on the ground that they are illegally detained as fugitives from justice. Their application must be denied where it is admitted that there is a valid judgment of conviction against them, for such

judgment will be given full faith and credit: *In re Maney*, 20 Wash. 509, 72 Am. St. Rep. 130, 55 Pac. 930.

2. Judgments of Federal Courts.—State judges, and state courts should refuse the application for a writ of habeas corpus when it appears upon the application that the party alleged to be illegally restrained of his liberty under the authority or claim and color of the authority of the United States by an officer of that government: *Tarble's Case*, 13 Wall. 397, reversing the decision of the supreme court of Wisconsin reported in 25 Wis. 390, 3 Am. Rep. 85; note to *Mullin v. People*, 22 Am. St. Rep. 424. If a prisoner confined under sentence of a federal court is released in virtue of a writ issued out of a state court, he may be rearrested on an order of the federal court. The state court had no authority to release him: *In re Johnson*, 46 Fed. 477. Federal courts have power to try and punish for contempt, and state courts will not interfere with their sentences therefor on habeas corpus: *Williamson's Case*, 26 Pa. St. 9, 67 Am. Dec. 374.

c. Federal Courts.

1. Judgments of State Courts, Generally.—After a prisoner is convicted of a crime by a state court and the case is finally disposed of by the highest court of the state, if such conviction is obtained in disregard or violation of rights secured to him by the constitution of the United States, two remedies are open to him in the federal courts—he may apply for a writ of error from the supreme court of the United States, and have his case re-examined on the question of whether the state court has denied him any right, privilege, or immunity guaranteed him by the constitution and laws of the United States, or he may apply for a writ of habeas corpus to be discharged from custody, on the ground that the state court had no jurisdiction of either his person or the offense charged, or had, for some reason, lost or exceeded its jurisdiction, so as to render the judgment a nullity. In this latter proceeding the federal courts cannot review the actions or rulings of the state court, which can be reviewed only upon a writ of error. But the federal courts have a discretion as to which of these remedies they will require the petitioner to adopt, and may put him to his writ of error rather than interfere by habeas corpus.

The better practice is, in a case of this kind, to put the prisoner to his remedy by writ of error. Then the validity of the judgment under which he is held can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner; and at the same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of releasing him in habeas corpus proceedings, and thereby depriving the state of the opportunity to assert further jurisdiction over his person respecting the crime with which he

is charged: *In re Tyson*, 21 Colo. 78, 39 Pac. 1093; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. Rep. 734; *In re Frederick*, 149 U. S. 70, 13 Sup. Ct. Rep. 793; *Markuson v. Boucher*, 175 U. S. 184, 20 Sup. Ct. Rep. 76; *In re Jordan*, 49 Fed. 238; *In re Maldonado*, 63 Fed. 825; *Eaton v. West Virginia*, 91 Fed. 760.

While the better practice and general rule is as above stated, yet there may be special circumstances which will induce the federal courts to entertain a writ of habeas corpus, although a writ of error could be prosecuted, where the petitioner claims that the judgment of a state court violates his rights under the laws, treaties, or constitution of the United States: *Mealey*, Petitioner, 134 U. S. 78, 10 Sup. Ct. Rep. 384; *Cohn v. Jones*, 100 Fed. 639. But the circumstances must be exceptional or extraordinary: *Fitts v. McGhee*, 172 U. S. 516, 532, 19 Sup. Ct. Rep. 269; *Nesbit v. Hert*, 91 Fed. 123. A person convicted in a state court in the course of a judicial inquiry under authority of acts of Congress was discharged on habeas corpus issued from a federal court in *Brown v. United States*, 2 Woods, 428, Fed. Cas. No. 1862.

When a state court has entered upon the trial of a criminal under a statute not repugnant to the constitution of the United States, and has jurisdiction of the offense and of the accused, no mere error in the conduct of the trial should be made the basis of jurisdiction in a federal court to review the proceedings on habeas corpus: *Andrews v. Swartz*, 156 U. S. 272, 15 Sup. Ct. Rep. 389; *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. Rep. 119; *In re Friedrich*, 51 Fed. 747.

The refusal of the state courts to grant a writ of error to one convicted of a crime, or to stay execution of the sentence, will not warrant interference by a federal court by means of habeas corpus: *Bergemann v. Backer*, 157 U. S. 655, 15 Sup. Ct. Rep. 727; *Kohl v. Leback*, 160 U. S. 293, 16 Sup. Ct. Rep. 304. And the writ will be denied when no reason is suggested why the supreme court of the state may not review the judgment on the question raised: *Ex parte Fonda*, 117 U. S. 516, 6 Sup. Ct. Rep. 848; or when it is apparent that the only result would be the remanding of the prisoner to custody: *In re Boardman*, 169 U. S. 39, 18 Sup. Ct. Rep. 291. A federal court cannot review a judgment of conviction by a state court on the ground of the misconduct of a juror: *In re King*, 51 Fed. 434; or on the ground that the defendant when convicted was under indictment in the federal courts for an offense against the United States, but was released on bail: *Mackin v. People (Ill., Sept. 30, 1886)*, 8 N. E. 178. And when the grounds stated in the petition are absolutely frivolous, the prisoner is not entitled to be discharged: *Storti v. Massachusetts*, 183 U. S. 138, 22 Sup. Ct. Rep. 72.

2. **Sentence of State Courts for Contempt.**—One deprived of his liberty without due process of law, by a state court, by being im-

prisoned for an alleged contempt not committed in the presence of the court, and without process or hearing, and the laws of the state give him no right of appeal, will be restored to his liberty by a federal court on habeas corpus: *Ex parte Stricker*, 109 Fed. 145. The federal courts may issue the writ to release a deputy revenue collector from imprisonment for an alleged contempt of a state court in refusing to testify as to the contents of the records of the internal revenue office: *In re Huttman*, 70 Fed. 699.

3. **Sufficiency of Indictment in State Court.**—If an indictment in a state court is merely defective, an error in rendering judgment upon it, even if the accused at the trial objected to it as insufficient, cannot be made the basis of jurisdiction in a federal court to issue a writ of habeas corpus. Where the state court has jurisdiction and proceeds under a statute not repugnant to the constitution of the United States, a federal court cannot interfere by habeas corpus with the execution of the sentence: *Bergemann v. Backer*, 157 U. S. 655, 15 Sup. Ct. Rep. 727. Whether an indictment is properly framed under state procedure, and whether the acts charged constitute the crime in question under the state statute, will not be examined on habeas corpus in a federal court: *In re Welch*, 57 Fed. 576.

4. **Constitutionality of State Statute.**—There is a discretion in the federal courts in the issuance of the writ of habeas corpus after trial and judgment in a state court in cases in which the state statute under which the proceedings were had is claimed to be in conflict with the constitution of the United States. The federal courts may refuse the writ, and leave the prisoner to his other remedies. Under ordinary circumstances they will refuse to grant it. Except in an urgent or extraordinary case, they will decline to entertain an application for the writ: *Ex parte McMinn*, 110 Fed. 954; *Minnesota v. Brundage*, 180 U. S. 499, 21 Sup. Ct. Rep. 455. In *Ex parte Kieffer*, 40 Fed. 399, habeas corpus was allowed to test the constitutionality of an ordinance. But the case was one in which the public, as well as the individual, were interested in a speedy settlement.

The repugnancy of a statute to the constitution of the state by whose legislature it was enacted cannot authorize a writ of habeas corpus from a federal court, unless the petitioner is in custody in virtue of such statute, and unless, also, the statute is in conflict with the constitution of the United States: *Andrews v. Swartz*, 156 U. S. 272, 15 Sup. Ct. Rep. 389. A federal court will decline to interfere when the petitioner complains that in the matter of indictment and trial, he was subjected to the provisions of statutes which had not been enacted in accordance with the state constitution: *In re Duncan*, 139 U. S. 449, 11 Sup. Ct. Rep. 573.

d. **Courts-martial.**—While the jurisdiction of courts-martial is limited, their judgments, so long as they act within the scope of their powers, are as valid and effectual as those of other tribunals. It is not the office of the writ of habeas corpus to perform the function of a writ of error or of an appeal in reviewing the judgment of a court-martial. The question of jurisdiction may be reached by such writ, as it may when the judgment of any tribunal is attached; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed; but, if this exists, however erroneous the proceedings may be, they cannot be redressed by habeas corpus: *People v. Fullerton*, 10 Hun, 63; *Ex parte Reed*, 100 U. S. 13; *Ex parte Mason*, 105 U. S. 696; *In re Crain*, 84 Fed. 788; *Rose v. Roberts*, 99 Fed. 948; *Carter v. McClaughry*, 105 Fed. 614.

It is decided in *Deming v. McCloughry*, 113 Fed. 639, that when a court-martial to try a volunteer is constituted by officers of the regular army, its judgment against him is without jurisdiction and void, and he is entitled to the writ of habeas corpus.

WILLIAMS v. HERT.

[157 Ind. 211, 60 N. E. 1067.]

HABEAS CORPUS CANNOT BE USED for the correction of mere errors and irregularities at the trial. (p. 204.)

HABEAS CORPUS—JURY TRIAL.—If one is convicted of petit larceny, a writ of habeas corpus for his release, on the ground that he was refused a jury trial, is properly denied. (p. 204.)

L. A. Douglas and H. W. Phipps, for the appellant.

W. L. Taylor, C. C. Hadley, Merrill Moores, and F. M. Mayfield, for the state.

211 MONKS, C. J. This is a proceeding by writ of habeas corpus against the superintendent and assistant superintendent of the Indiana reformatory for the discharge of appellant from said institution. On motion of appellees the writ of habeas corpus was quashed. It is alleged in the application for the writ that appellant was charged in the Madison circuit court by affidavit and information with the crime of petit larceny; that he entered a plea of not guilty to said charge, and de-

manded that said cause be tried by a jury, which demand was refused; that he was tried by the court, found guilty of the offense charged, and it was found that he was twenty-five years of age. Judgment was rendered on the ²¹² finding. Appellant insists that all the proceedings in said cause, after his demand for a jury trial, were without jurisdiction, and the same were and are absolutely void.

If the Madison circuit court refused appellant a trial by jury, such action of the court, even if erroneous, did not deprive said court of jurisdiction of the offense charged, nor of the person of appellant. Such error can only be reviewed and corrected on appeal: *Koepke v. Hill*, 157 Ind. 172, ante, p. 161, 60 N. E. 1039; *Winslow v. Green*, 155 Ind. 368, 369, 58 N. E. 259, and cases cited. As was said in the case last cited: "The law is firmly established that jurisdiction being once obtained over the person and subject matter, no error or irregularity in its exercise will make the judgment void."

This proceeding is a collateral attack on said judgment of the Madison circuit court committing appellant to the Indiana reformatory, and cannot succeed unless said judgment is absolutely void: *Crawford v. Lawrence*, 154 Ind. 288, 58 N. E. 673; *Winslow v. Green*, 155 Ind. 368, 58 N. E. 259, and cases cited; *Lee v. McClelland*, 157 Ind. 84, 60 N. E. 692; *Koepke v. Hill*, 157 Ind. 172, ante, p. 161, 60 N. E. 1039.

This proceeding cannot therefore be used for the correction of errors and irregularities in said criminal case under which appellant was committed to the Indiana reformatory: *Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8; *Lee v. McClelland*, 157 Ind. 84, 60 N. E. 692.

As the Madison circuit court had full and complete jurisdiction of the criminal case against appellant and of his person, the judgment was not void.

It is proper to say that appellant appealed from the judgment of the Madison circuit court committing him to the Indiana reformatory to this court, and sought a reversal of that cause upon the same ground alleged in his application for a writ of habeas corpus in this proceeding, and that said judgment was affirmed: *Williams v. State*, 157 Ind. 94, 60 N. E. 942.

Judgment affirmed.

Habeas Corpus.—One convicted of a misdemeanor cannot demand his discharge in habeas corpus proceedings on the ground that he was denied a jury trial: See the monographic note to *Koepeke v. Hill*, ante, pp. 168-202.

STATE v. SMITH.

[157 Ind. 241, 61 N. E. 566.]

CONCEALED WEAPONS.—A TRAVELER, to come within the exemption of a statute prohibiting the carrying of concealed weapons, is a person traveling at least such a distance as takes him among strangers, with whose habits, conduct, and character he is not acquainted, where unknown dangers may exist, from which there may be a necessity to protect himself. (p. 205.)

CONCEALED WEAPONS—TRAVELERS.—One who goes from his home by rail, a distance of fifteen miles, in an adjoining county to attend a political meeting, is not a traveler entitled to carry concealed weapons, within the meaning of the Indiana statutes. (pp. 205, 206.)

W. L. Taylor, attorney general, Merrill Moores, C. C. Hadley, E. W. McIntosh, and W. H. Bridwell, for the state.

No counsel indicated as appearing for the appellee.

242 MONKS, C. J. Appellee was tried and acquitted of the offense of carrying concealed weapons. This appeal was taken under section 8 of the act of 1901 (Acts 1901, p. 566), being section 1337h of Burns' Revised Statutes of 1901, and requires this court to determine the proper construction of section 2069 of Burns' Revised Statutes of 1901, section 1985 of the Revised Statutes of 1881 and Horner's Revised Statutes of 1897.

The question presented is whether or not appellant, who went from his home in Sullivan, Indiana, by rail, to Linton, in an adjoining county, a distance of fifteen miles, to attend a political meeting, having no other business, and returned from the meeting to his home, was a traveler within the meaning of section 2069 (1985), *supra*. If he was a traveler his case must be affirmed; if he was not, the appeal must be sustained.

The evil sought to be remedied by said section was the insecurity of life caused by the pernicious habit of carrying con-

cealed weapons, and the consequent demoralization of society. The word "traveler," when used in a broad sense, designates one who travels in any way, distance not being material. It is clear that the legislature did not use the word in this sense, for such signification would destroy the very purpose for which the section was enacted, by licensing rather than suppressing the practice of carrying concealed weapons. It is manifest, therefore, that the word was employed in a more limited sense, and was intended to designate a person traveling at least such a distance as takes him among strangers, with whose habits, conduct, and character he is not acquainted, where unknown dangers may exist, from which there may be a necessity to protect himself by preparing for a defense against an attack.

It follows that to come within the exemption of said section the travel must be without the ordinary habits, business, or duties of the person, and at least to such distance from his home as takes him beyond the circle of his general ²⁴³ acquaintances, among strangers with whose habits, conduct, and character he is not acquainted: Bishop on Statutory Crimes, sec. 788a; Bouvier's Law Dictionary (Rawles' rev. ed.), 1134; 5 Am. & Eng. Ency. of Law, 2d ed., 743; Gholson v. State, 53 Ala. 519, 25 Am. Rep. 652, and cases cited; McGuirk v. State, 64 Miss. 209, 1 South. 103; Hathcote v. State, 55 Ark. 181, 183-185, 17 S. W. 721; Davis v. State, 45 Ark. 359. To the extent that Burst v. State, 89 Ind. 133, and Lott v. State, 122 Ind. 393, 24 N. E. 156, may be deemed to hold a contrary doctrine, they are disapproved.

It is therefore evident that appellant was not a traveler within the meaning of said section. Appeal sustained.

Concealed Weapons—Travelers.—One returning in a wagon from a town in one county to his home in another, a distance of twenty-three miles, is not traveling within the meaning of a statute which prohibits the carrying of concealed weapons, unless the bearer is traveling or setting out on a journey: Gholson v. State, 53 Ala. 519, 25 Am. Rep. 652. See, further, Shelton v. State, 27 Tex. App. 443, 11 Am. St. Rep. 200, 11 S. W. 457; Stilly v. State, 27 Tex. App. 445, 11 Am. St. Rep. 201, 11 S. W. 458; Carr v. State, 34 Ark. 448, 36 Am. Rep. 15. The traveling must be without the ordinary habits, business, or duties of the person, to a distance from his home, and beyond the circle of his friends and acquaintances: Gholson v. State, 53 Ala. 519, 25 Am. Rep. 652.

SHERIDAN BRICK WORKS v. MARION TRUST CO.

[157 Ind. 292, 61 N. E. 666.]

RECEIVER PENDENTE LITE.—A PROCEEDING FOR THE APPOINTMENT of a receiver pendente lite is but ancillary or auxiliary to the main action, and is not its ultimate object. (p. 211.)

RECEIVER OF CORPORATION.—THE RULE REQUIRING STOCKHOLDERS TO SEEK REDRESS from the officers of the corporation before applying to a court of equity for relief does not apply where there is no directory or governing body to which an application can be made. (p. 212.)

RECEIVER OF CORPORATION—GROUNDS FOR.—In an action on certain notes against a corporation by the administrator of a deceased stockholder and creditor thereof, a receiver pendente lite should be appointed for the corporation, where it appears that there virtually is no governing body, that there are dissensions among the stockholders, that the concern has no available means to operate its plant or pay its indebtedness, and that its property is deteriorating in value. (pp. 207, 213.)

APPEAL—WEIGHT OF EVIDENCE.—The rule that the supreme court will not weigh the evidence on appeal has no exception in a proceeding to appoint a receiver. (p. 213.)

L. D. Hay, J. W. Bowlus, and C. C. Hadley, for the appellant.

A. C. Ayres, A. Q. Jones, and J. E. Hollett, for the appellee.

²⁹³ **JORDAN, J.** Appellee, the Marion Trust Company, as the administrator of the estate of Mason J. Osgood, filed an amended complaint in the lower court, consisting of twenty-one paragraphs; in each of these, except the last, it sought to recover against appellant on certain promissory notes in favor of its decedent's estate. These notes in the aggregate amount to forty-five thousand dollars. By the last paragraph of the complaint appellee sought for the appointment of a receiver pendente lite. After hearing the evidence introduced by each of the parties, the court made an interlocutory order whereby a receiver was appointed for said corporation, and for a reversal of that order this appeal is prosecuted. The errors assigned relate to the insufficiency of the complaint and to the alleged error of the court in appointing a receiver under the evidence.

The material facts, among others, set forth in the paragraph of complaint in question may be summarized as follows: Appellant is a corporation engaged in the manufacture of brick, and its principal office is located in the city of In-

dianapolis, Indiana. It is engaged in operating two plants in the manufacture of brick, one of which is situated in the town of Sheridan, Hamilton county, and the other at Brazil, Clay county, Indiana. The capital stock is fifty thousand dollars, divided into five hundred shares, of which two hundred and fifty are owned and held by Oliver H. Root, and two hundred and forty-nine shares are owned and held by the estate of Mason J. Osgood, and one share is owned by Aquilla Q. Jones. Mason J. Osgood died on December 10, 1900, and previous to his death, he, together with said Oliver H. Root and Aquilla Q. Jones, constituted the directory of the corporation. Osgood, at the time of his death, was also the ²⁰⁴ president and manager of the concern, and Root was the secretary and treasurer thereof. The company is indebted to the estate of Mason J. Osgood, of which the Marion Trust Company is the administrator, in the sum of forty-five thousand dollars, which indebtedness is past due and unpaid, and the company has no funds out of which to pay and discharge said indebtedness. The brick works of the company situated at Sheridan are idle, and the company has no money to operate them, and because of their not being operated they are rapidly deteriorating in value. Prior to and at the death of Osgood, the company's president, there existed a disagreement among its officers and stockholders in respect to the management of the concern, and this disagreement still continues to exist, and thereby the affairs of the company are in an unsettled condition. On the third day of January, 1901, a meeting was held by the stockholders for the purpose of filling the vacancies which had resulted in the directory and in the office of president by reason of the death of Osgood, but the stockholders were unable to agree upon persons to fill said vacancies, and by reason of the continuance of such disagreement these offices remain vacant, and the company has no president or manager and but two directors, and will continue in this condition, for the reason that the stockholders cannot or will not agree upon some one to fill said offices. Root, the secretary and treasurer, and also one of the two directors, has refused to call any meeting of the company for the purpose of endeavoring to elect a third director and a president, and by reason of this condition of the company its business and

property are in danger of and liable to be dissipated and irreparably injured unless a receiver is appointed by the court to take charge of, and manage the affairs of, the corporation. Sections 2 and 4 of article 1 of the company's by-laws, as set out in the complaint, are as follows: "Sec. 2. The president shall preside at all meetings of the company, and shall be the manager and have active control of the business affairs of ²⁹⁵ the company. He shall approve all bills and countersign all checks given for disbursements by the company. . . . Sec. 4. The treasurer shall receive and hold all funds of the company, and shall place them on deposit to the credit of the company in such bank or banks as the board of directors may order or direct. He or she shall make no disbursements unless especially directed to do so by either the president of the company or board of directors. The president of the company shall countersign all checks with the treasurer."

In compliance with these by-laws, the funds of the company for a long time prior to the death of Osgood had been deposited in the Fletcher National Bank of Indianapolis, to be checked out only as provided by the by-laws. At the time of the death of Mason J. Osgood, its president, the company had on deposit in said bank thirteen hundred and five dollars and forty-two cents, and this money cannot now be drawn or used by the company for the reason that there is no president to countersign the checks drawn upon said bank as provided by the by-laws. Oliver H. Root, the secretary and treasurer and one of the directors as heretofore stated, in violation of the by-laws of the company, as alleged, is assuming to manage the business of the concern, and is neglecting to deposit the money in the bank as the by-laws direct. The company has no officer authorized to manage its affairs or to approve bills, or countersign checks drawn upon banks. That by reason of all which its affairs have become complicated, and there are numerous creditors who are likely to commence suits against said company, to enforce the payment of their claims, and its assets and property are liable to become dissipated and destroyed, and the company is in danger, it is alleged, of becoming insolvent. Appellant contends that the complaint upon which the order appointing a receiver is based does not state facts sufficient to authorize the appointment. The con-

tention is that appellee, the moving party, under the facts therein alleged, is shown to occupy only the position of a creditor, and as such, ²⁹⁶ in order to secure the appointment of a receiver, it must further be shown that it has a lien on the property of appellant, or an equitable claim thereto. Reviewing the facts as alleged in the amended complaint, we find that they disclose that appellee's decedent at the time of his death was a large stockholder in appellant corporation, and that this stock is now held by appellee as the representative of his estate. The entire stock, it appears, was held by three persons, Root, Jones, and Osgood, appellee's decedent, and these three constituted the directory of the corporation. Osgood at the time of his death was the president and manager of the concern. The by-laws set out and embodied in the complaint show that the president has the active control of the company's business affairs and is required to approve all bills and countersign all checks, etc. Osgood, in addition to his being a stockholder, was also at the time of his death a creditor of the company, holding claims due against the same to the amount of forty-five thousand dollars. It also appears that appellant, in addition to this indebtedness, was indebted to other persons to the amount of fifteen thousand dollars, and that it has no money with which it can meet and pay its said indebtedness. It is further disclosed that by reason of being without money or means to defray its necessary operating expenses, one of its plants is idle and is fast deteriorating in value. Root holds one-half the stock, and Osgood's estate, together with Jones, holds and controls the remainder. By reason of disagreement and dissension upon the part of these stockholders, the vacancy in the directory and also in the office of president, occasioned by the death of Osgood, still continue unfilled. It is charged that Root is wrongfully, and in defiance of the by-laws of the corporation, attempting to manage its business, and that its property is in danger of being dissipated and injured, and that the corporation is in danger of becoming insolvent, etc. It is certainly evident, under the facts, that the interest which the estate of Osgood, represented by appellee, has in the corporation in question is of a ²⁹⁷ dual or twofold character—namely, that of a stockholder and also that of a creditor. The facts show that since the death of

Osgood the company has but two directors, while the governing statute under which it was organized and operated expressly requires that its business shall be managed by not less than three directors: Burns' Rev. Stats. 1901, sec. 5054. This section also provides that the directory shall elect a president. It is manifest, then, that until the vacancy in the directory is filled no president can be rightfully chosen, and the corporation will continue to be without any legitimate governing body or head to carry on or conduct its business affairs. In this state it seems that the company is confronted with the fact that it has no available means to operate its plant, and that its property is, by reason of its unfortunate condition, deteriorating in value. Notwithstanding the condition, however, in which the concern has been placed, it seems that Mr. Root, one of its stockholders, is attempting, without right, to manage and control its business affairs. Section 1236 of Burns' Revised Statutes of 1901 provides that "a receiver may be appointed in the following cases: 3. In all actions, when it is shown that the property. . . . in controversy is in danger of being lost, removed, or materially injured; 5. When a corporation is insolvent, or is in imminent danger of insolvency; 7. And in such other cases where, in the discretion of the court, or the judge thereof in vacation, it may be necessary to secure ample justice to the parties."

In *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338, in considering the force and effect of this last clause of the above section, we said: "Under its authority a receiver may be appointed in any case in which, according to the established rules of equity, the appointment may be necessary 'to secure ample justice to the parties,' without regard to the form or character of the principal action: *Hellebush v. Blake*, 119 Ind. 349, 21 N. E. 976; *Connelly v. Dickson*, 76 Ind. 440; *Wayne Pike Co. v. Hammons* ²⁹⁸ 129 Ind. 368, 27 N. E. 487; *Goshen etc. Co. v. City Nat. Bank*, 150 Ind. 279, 49 N. E. 154."

It is true that a court generally will, and should, decline to appoint a receiver in any case where it has no reason to believe that a benefit will result from the appointment: *Beach on Receivers*, sec. 7; *Smith on Receivers*, sec. 5. But a court confronted with the facts and circumstances as they are shown

to exist in this case would certainly have cause to believe that a temporary transfer, at least, of the management and control of the property and affairs of this headless concern, to the hands of a receiver, under the supervision of the court, would be of more benefit to all concerned than to permit the corporation to remain and continue in its condition as shown to exist. A proceeding to secure the appointment of a receiver pendente lite is not an independent proceeding. It is but ancillary or auxiliary to the main action, and is not the ultimate purpose or object contemplated by the principal action: *Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585. .

It is true that the applicant or moving party for a receiver in all cases, in order to prevail, must show, among other things, that he has a present existing interest, or at least a probable right or interest in or to the property, fund, or assets over which he seeks to have a receiver appointed: *Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128; *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585; *Steele v. Aspy*, 128 Ind. 367, 27 N. E. 739; *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338.

We recognize the general rule for which appellant contends that the legal relations existing among the members of a corporation require them first to seek redress from its officers for any wrong done to them as shareholders before applying to a court of equity for relief. But this rule is subject to well-recognized exceptions, the principal one of which is that the rule is not applicable when it appears that such application, in the first instance, to the officers of the ²⁹⁹ corporation for such redress would be unavailing to protect the rights of the shareholder or shareholders. The exception will certainly apply in the case at bar, so far as the estate of Osgood as a shareholder is concerned, in the appointment of a receiver, for, under the facts as previously shown, it appears that there is no directory or governing body to which an application for redress could be made. Neither can it be asserted that this proceeding is an unwarranted attempt on the part of appellee to wrest the management and control of appellant's affairs from its legally constituted officers, and turn its property and busi-

ness over to the management and control of a receiver. It virtually has no directory or governing body to control its affairs, and by reason of the alleged dissensions or disagreements existing among its stockholders, this condition bids fair to continue for an indefinite time. The ultimate object of the principal suit in this case is to recover a judgment against appellant for forty-five thousand dollars, due to the estate of Osgood. This estate, as a stockholder and as a creditor, is interested in and has a right to have the affairs and business of appellant properly and legally managed and conducted, and its funds and property protected, preserved, and properly applied to a legitimate use or purpose, in order that the indebtedness may be paid. As a stockholder it is also interested in having the corporation preserved, and not dissolved, so that subsequently, if expedient, the management and control of its business and property may be returned by the court to its legally constituted officers. We are aware of the rule contended for by appellant, that the appointment of a receiver is an extraordinary and harsh remedy, and as a general rule is not awarded where there exists a complete or adequate legal remedy. But under the facts in this case we think it was eminently proper for a court of equity to interpose its prerogative and appoint a receiver pending the litigation: *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Hellebush v. Blake*, 119 Ind. 349, 21 N. E. 976; *Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128; ³⁰⁰ *Goshen etc. Co. v. City Nat. Bank*, 150 Ind. 279, 49 N. E. 154; *Smith on Receivers*, 361; *Conro v. Gray*, 4 How. Pr. 166; *Sage v. Memphis etc. R. R. Co.*, 125 U. S. 361, 8 Sup. Ct. Rep. 887; *Cook on Stock and Stockholders*, sec. 684, footnote 2; *Morawetz on Private Corporations*, secs. 284, 285.

We conclude that the amended complaint under the facts therein averred is sufficient to justify the court in appointing a receiver.

It is finally urged that the order of the court is not supported by sufficient evidence. It is true that the evidence in regard to some of the points in issue is conflicting, but there is evidence which fully sustains the complaint in all respects. The rule that this court will not weigh the evidence on appeal has no exception in a proceeding to appoint a receiver. In

such cases, as in all others, there must be such a deficiency of evidence on some material point as to raise a question of law before this court will be justified in disturbing the order of the lower court upon the evidence: *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338.

The evidence in the record in this case, in our opinion, discloses such a state or condition in respect to appellant that to leave longer its property and business affairs to be managed and controlled without any head or governing body would, it appears, result in irreparable injury or damage to both its stockholders and creditors.

The interlocutory order appointing the receiver is in all things affirmed.

The Receiver Pendente Lite of a corporation is simply an officer of the court, to preserve and distribute the assets of the concern: *Jackson v. McInnis*, 33 Or. 529, 72 Am. St. Rep. 755, 54 Pac. 884, 55 Pac. 535. The proceeding for his appointment is ancillary to the main action: *State v. Union Nat. Bank*, 145 Ind. 537, 57 Am. St. Rep. 209, 44 N. E. 585.

A Receiver of a Corporation may be appointed if there are dissensions among the stockholders, and it cannot meet its obligations, and its assets or property is deteriorating or being wasted. And a stockholder is not always bound, in conformity with the general rule, to seek redress of the directors, before applying to a court of equity for a receiver: See the monographic note to *Cameron v. Groveland Imp. Co.*, 72 Am. St. Rep. 48-60.

RUSSELL v. PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[157 Ind. 305, 61 N. E. 678.]

CARRIERS—RELEASE OF LIABILITY.—A common carrier of goods or passengers cannot contract with a customer for a release from liability resulting from the carrier's negligence. (p. 217.)

CARRIERS—GRATUITOUS CARRIAGE.—The mere nonpayment of fare, or gratuitous carriage, will not of itself deprive a traveler of his right of action for the results of negligence of the carrier. (p. 220.)

CONSTITUTIONAL LAW.—THE RIGHT OF PRIVATE CONTRACT is no small part of the liberty of a citizen, and the usual and most important function of courts is rather to maintain and enforce contracts, than to enable the parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare. (p. 221.)

RAILROAD—SLEEPING-CAR COMPANY AND EMPLOYÉ. A railroad company is under no legal duty to receive a sleeping-car from a Pullman company, nor its employé thereon. (pp. 223, 224.)

RAILROAD—RELEASE FROM LIABILITY TO PALACE-CAR EMPLOYEE.—A railroad corporation may contract for a release from liability for negligence toward an employé of a sleeping-car company, whose coaches are attached to the former company's passenger train. (pp. 215, 225.)

RAILROAD—RELEASE FROM LIABILITY.—A CONTRACT BETWEEN A SLEEPING-CAR COMPANY and its employé, releasing transportation companies over whose lines its coaches may operate from all liability for personal injuries to him, is valid, and inures to the benefit of a railroad company hauling a coach in which the employé is injured. (pp. 215, 225.)

RAILROAD—RELEASE FROM LIABILITY FOR NEGLIGENCE.—A contract between a sleeping-car company and its employé releasing transportation companies "from all claims for liability of any nature or character whatsoever, on account of any personal injury or death," includes injuries resulting from the negligence of a transportation company. (p. 225.)

A. C. Ayres, A. Q. Jones, and J. E. Hollett, for the appellant.

S. O. Pickens and F. C. Olive, for the appellee.

306 DOWLING, J. This was an action by the appellant, Ambrose Russell, against the appellee, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company for an injury sustained by appellant while acting as a porter upon a Pullman sleeping-car attached to appellee's passenger train. The complaint alleged that on the twenty-first day of August 1898, appellee operated a railway line through this state; that near the town of Cementville, Indiana, a sidetrack ran parallel to, and a few feet from, the side of the main track of appellee's line, and was used by the appellee in switching and operating cars; that on the said date appellant was employed as a porter on a Pullman coach attached to, and constituting a part of, a certain passenger train operated by the appellee; that as said passenger train was moving rapidly over the main tracks near the town of Cementville, and passing by another train of the appellee upon the sidetrack, the appellant, who was at the time seated near a window of the Pullman coach, was suddenly struck by a door or other obstacle which the appellee had carelessly allowed to project from the train of cars upon the sidetrack, or from its right of way at that point; that the said projection entered the window of the car in which the ap-

pellant was seated, and struck him upon the arm and ³⁰⁷ elbow, breaking and crushing them, whereby they were rendered stiff, sore, and permanently disabled. The complaint denies negligence on the part of the plaintiff and avers that the accident was occasioned wholly by reason of the negligence of the appellee.

To the complaint the appellee filed answers in three paragraphs, the first being a general denial, which was afterward withdrawn. The second paragraph alleged that a written contract had been entered into between the appellee and the Pullman Palace Car Company, by which the latter company agreed to furnish sleeping-cars to be used for the transportation of passengers over the road of appellee; that said Pullman Car Company was, by said agreement, entitled to and did collect revenue from all passengers using its cars; that it furnished one or more employes upon each of such cars, who were, by the said contract, carried free of charge over the road of the appellee. It was further stipulated in said agreement that, in the event of any liability arising against the said railroad company, over whose railroad said cars were to be run, for personal injury, death, or otherwise of any employe of said Pullman Palace Car Company the said railroad company should be indemnified for said liability, and the same paid by said Pullman Palace Car Company. The answer then alleged that the appellant, at the time of the accident, was an employe of the Pullman company, in charge of one of that company's sleeping-cars, and was being hauled in said car in compliance with the contract above referred to; that he had neither paid, tendered, nor agreed to pay any fare for his passage; that he had, prior to the injury complained of agreed in writing with said Pullman company as follows: "4. In consideration of said employment and wages, I undertake and bind myself to assume all risks of accidents or casualties by railway travel or otherwise, incident to such employment and service, and hereby for myself, my heirs, executors, administrators, or legal representatives, forever ³⁰⁸ release, acquit, and discharge said Pullman Palace Car Company, its assigns and legal representatives, from any and all claims for liability of any nature or character whatsoever, on account of any personal injury or death to me in such employment and service. 5. I undertake and bind my-

self to obey all rules and regulations of the transportation companies, made for the government of their own employés, over whose lines the cars of said Pullman Palace Car Company may operate, while I am traveling over said lines in the employment and service of said Pullman Palace Car Company; and in consideration of said employment and wages, I hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit, and discharge any and all such transportation companies from all claims for liability of any nature or character whatsoever on account of any personal injury or death to me, while traveling over such lines, in said employment and service." The answer alleges that both of these agreements were in force at the time of the accident.

The third paragraph of answer states substantially the same facts as the second, except that no mention is made of the written contract between the appellee and the Pullman company for indemnity by the latter for liabilities for the injury or death of its employés.

To these two paragraphs of answer the appellant filed separate demurrers, upon the ground that neither paragraph stated facts sufficient to constitute a defense to appellant's complaint, which demurrers were overruled and exceptions reserved. On appellant's refusal to plead further, judgment was rendered in favor of the appellee. The appellant assigns for error the overruling of the separate demurrers to the second and third paragraphs of answer. Counsel have discussed both these rulings as involving the same questions, and we shall so treat them.

The principal question here presented is, whether a contract ³⁰⁹ between a palace car company and a porter having charge of one of its sleeping-cars is invalid in so far as it attempts to exempt transportation companies, over whose lines the coaches of the palace car company are being run, from all liability arising from their negligence and the negligence of their servants; and whether such contract may be pleaded in bar of an action by such porter against a transportation company for an injury caused wholly by the latter's negligence.

The decisions of this state firmly establish that a common carrier of goods or passengers cannot contract with a customer for a release of the carrier from liability resulting from the

latter's negligence: *Wright v. Gaff*, 6 Ind. 416; *Ohio etc. Ry. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Louisville etc. Ry. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Insurance Co. of North America v. Lake Erie etc. Ry. Co.*, 152 Ind. 333, 335, 53 N. E. 382.

The grounds upon which this prohibition rests are variously stated by the court. It has been said that such exemptions are against public policy; that the public is interested in the exercise of care and diligence on the part of the carrier; that it is unreasonable for any person or corporation to contract for the privilege of being negligent, and that the public is concerned with the life and security of every citizen. The fundamental reason, however, for holding common carriers, such as the appellee, liable for the results of their negligence, notwithstanding contracts exempting them therefrom, is that the state has granted them privileges which they exercise for the benefit of the public; in return for these, the common carrier impliedly undertakes to use due care and diligence in the transportation of both goods and passengers. This being a main inducement for the grant of its special rights, the carrier cannot by any special contract rid itself of the burden of responsibility, which is one of the conditions of its creation. Were it permitted to escape liability by entering into exonerating agreements, its position of advantage over ³¹⁰ its patrons would, in almost every instance, enable it to force from them such stipulations as it desired, and the object of the state in creating the carrier would be virtually defeated, the carrier thus being able to abandon the duty imposed upon it by the state. As said in the case of *Louisville etc. Ry. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869, at page 130 (126 Ind., 25 N. E. 869): "A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with a passenger that the latter should take the risk of the negligence of the carrier or of his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will

be regarded as unreasonable, contrary to public policy, and therefore void."

In *Cleveland etc. R. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362, at page 12 (19 Ohio St., 2 Am. Rep. 365), the court say: "Carriers of the class of the plaintiff in error are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care. This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed, to a very great extent, to the care of public carriers. . . . It cannot be denied that pecuniary liability for negligence promotes care; and if public carriers ³¹¹ in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence."

Again, in *New York etc. R. R. Co. v. Lockwood*, 17 Wall. 357, cited by the appellant, the supreme court of the United States say, at page 377: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the security of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other, it is directly and absolutely prescribed by law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that

he may do so seems almost a contradiction in terms. . . . Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation. The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, ³¹² or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. . . . The proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law. . . . The inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to devalue the transaction of validity."

The inquiry remains, Is the present contract of exemption invalid as being within the theory of the rule above explained? If it is, it must be by virtue of some positive statute, or because of the fact that it is an abandonment by the carrier of a public duty.

No statute applies, for the recent act of the legislature, Acts of 1901, page 515, which may possibly include similar agreements, was enacted after the present suit was instituted, and expressly excepts pending litigation from its operation.

In determining whether this contract is invalid, we lay out of the case all consideration of the question whether the appellant was being carried gratuitously or for hire. The law is well settled that mere nonpayment of fare, or gratuitous carriage will not of itself deprive a traveler of his right of action for the results of negligence of the carrier: *Ohio etc. Ry. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Louisville etc. Ry. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468; *Jacobus v. St. Paul etc. Ry. Co.*, 20 Minn. 125, 18 Am. Rep. 360.

It may be that the appellant should be considered not as a licensee carried gratuitously, but as a person, the compensation for whose carriage was paid by the Pullman company when it entered into an agreement with the appellee for furnishing employes upon sleeping-cars: See *Cleveland etc. Ry. Co. v. Ketcham*, 133 Ind. 346, 36 Am. St. Rep. 550, 33 N. E. 116; *Grand Trunk R. R. Co. v. Stevens*, 95 U. S. 655; *Missouri etc. Ry. Co. v. Ivy*, 71 Tex. 409, 10 Am. St. Rep. 758, 9 S. W. 346.

On the other hand, the fact that compensation has been paid by, or on behalf of, one who is being carried on a railway car does not necessarily give him a right of action, even for injuries caused by the carrier's negligence. If his carriage is not in the performance of a duty imposed upon the carrier by law, then it will depend upon the terms of his particular contract with the railroad company whether or not there is any liability. As said in the case of *Baltimore etc. R. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, at page 505 (176 U. S., 20 Sup. Ct. Rep. 387): "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important functions of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare."

In the case of *Louisville etc. Ry. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796, the above rule was strictly followed. There, an express messenger, in his written contract with the American Express Company, agreed to assume all risks of accidents and injuries sustained in the course of

his employment, whether occasioned by the negligence of any corporation engaged in operating any ³¹⁴ railroad, or of any employé of such corporation. The only compensation which the railway company was to receive for carrying the express messenger was that paid by the express company to it. The court held that, as railroads are not required by law to accept the traffic of independent express companies, they are not guilty of a departure from their public duty in availing themselves of a contract of exemption from liability for negligence, entered into between the express messenger and his employer, the express company. As stated by the court (146 Ind. 26, 58 Am. St. Rep. 351, 44 N. E. 798): "A common carrier may, however, become a private carrier or bailee for hire, where, as a matter of accommodation or special engagement, he undertakes to carry something which it is not in his business to carry": See the cases referred to at length in the course of the opinion.

In the case of *Pittsburgh etc. Ry. Co. v. Mahoney*, 148 Ind. 196, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464, this court again held valid a contract exempting the railroad company from liability for its negligence resulting in the death of an express messenger carried upon its train under a special agreement with the express company. At page 200 (148 Ind., 62 Am. St. Rep. 507, 46 N. E. 103), the court say: "These authorities probably sustain the proposition stated when applied to exemption against negligence in the discharge of a public or quasi public duty, such as that owing by a common carrier to an ordinary shipper, passenger, or servant. In a recent decision of this court, however, that of *Louisville etc. Ry. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796, we recognized the well-established rule that railway companies, although public or common carriers, may contract as private carriers, such as that of transporting express matter for express companies, as such matter is usually carried, and in that capacity may properly require exemption from liability for negligence as a condition to the obligation to carry": Citing cases.

In the case of *Baltimore etc. R. R. Co. v. Voigt*, 176 U. S. 498, 20 Sup. Ct. Rep. 385, arising under a state of facts similar to those in the ³¹⁵ *Keefer* case, *supra*, the supreme court of

the United States, reversing the judgment of circuit court of appeals for the sixth circuit, and citing and approving the decisions in *Louisville etc. Ry. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796, and *Pittsburgh etc. Ry. Co. v. Mahoney*, 148 Ind. 196, 62 Am. St. Rep. 503, 47 N. E. 464, 46 N. E. 917, held the carrier exonerated from all liability to the express messenger, because of a special contract entered into between the latter and the express company. At page 512, the court use the following language: "It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, specially adapted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies of any liability to him, or to each other, for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger. His position does not resemble the one in consideration in the *Lockwood* and similar cases, where the dispensation from liability for injuries was made a condition of a transportation which the passenger had a right to demand, and which the railroad companies were under a legal duty to furnish. Doubtless, had Voigt only desired the method of transportation afforded the ordinary passenger, he would have been entitled to the rule established for the benefit of such a passenger. But this he did not desire. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express-car as part of his regular employment, and as provided in a contract which, as we have seen, the railroad company was under no local compulsion to enter into."

³¹⁶ This statement of the law is applicable to the present case. The appellant did not occupy the position of an ordinary passenger upon appellee's train. He was not being carried upon

any journey from one point to another, nor was his presence incidental to the shipment of goods which the carrier was bound to accept. He occupied the sleeping-car as a part of his employment with the Pullman company. His was not a position of disadvantage with reference to the appellee, rendering it practically impossible for him to reject the terms of limited liability contained in his contract with the Pullman company. He might have declined to enter into such an employment, and have returned to his usual occupation described in the complaint as that of a stationary engineer and electrician.

In no sense was the appellee bound to accept the appellant upon its trains, solely because he accompanied a palace-car tendered by the Pullman company, for the obvious reason that the carrier was under no legal obligation to accept and haul the sleeping-car itself. Counsel for appellant urge the argument that it is customary for sleeping-cars to be attached to railway trains, thus affording a great convenience to travelers, and hence the carrier is not proceeding outside of its regular business in accepting such coaches. But counsel fail to distinguish between a departure from the legitimate business of a carrier and the doing of an act which, though within the general scope of its powers, is not imposed upon it as a duty. It would be no ground for an action of *quo warranto* against a railroad corporation that it has transported circus-cars or express-cars over its lines, or that a street-car company has received for carriage a bag of specie. But no one would seriously contend that these acts are such as the carrier must perform. He may perform them, but if he refuse, he cannot be proceeded against as for a violation of his common-law duty. If he does agree to perform them he may stipulate, specially, how far his liability for negligence shall extend: *Coup v. Wabash etc. Ry. Co.*, 56 Mich. 111, ³¹⁷ 56 Am. Rep. 374, 22 N. W. 215; *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; *Blank v. Illinois etc. R. R. Co.*, 182 Ill. 332, 55 N. E. 332.

Counsel for appellant have referred us to no case holding that railroad carriers must receive sleeping-cars for transportation over their lines in connection with the railroad passenger trains. The case of *Pullman etc. Car Co. v. Missouri etc. Ry. Co.*, 115 U. S. 587, 6 Sup. Ct. Rep. 194, assumes that no such

duty rests upon the common carrier. The court say at page 597 (115 U. S., 6 Sup. Ct. Rep. 199): "It may be, as is also alleged, that it has 'become indispensable, in the conduct of the business of a railroad company, to run on passenger trains sleeping and drawing-room cars, with the conveniences usually afforded by such cars for night travel,' but it by no means follows that the railway is, in law, obliged to arrange with the Pullman company for such accommodations. . . . The business is always done under special written contracts. These contracts must necessarily vary, according to the special circumstances of each particular case."

But appellant contends that, inasmuch as appellee was not a party to the contract exempting transportation companies from liability for negligence, it cannot take advantage of its terms. The contract referred generally to transportation companies over whose lines the Pullman company should run its cars. This comprehended the appellee, and, as the contract was *prima facie* for the benefit of the appellee, it will be presumed to have accepted its provisions, and it may now claim its advantages, as one in whose interest the agreement was executed. There was sufficient privity shown between the appellant and the appellee: *Ransdel v. Moore*, 153 Ind. 393, 405, 407, 53 N. E. 767.

We conclude, therefore: 1. That the appellee was under no legal duty to receive either the appellant or the car upon which he rode since the appellant was not, and did not, purport to be a passenger, but occupied the sleeping-car under a special contract between the Pullman company ³¹⁸ and the appellee; 2. The appellee could, under these circumstances, contract specially for a release from all liability for negligence toward appellant; 3. A contract of release made between the appellant and the Pullman company inured to the benefit of the appellee, referred to generally therein, and its provisions can be taken advantage of by the latter in this action.

Appellant next argues that, even if a contract for exemption from liability were valid, this particular contract is void, because the word "negligence" is not used in the exonerating clause. The language employed is: "I hereby . . . release, acquit, and discharge any and all such transportation companies from all claims for liability of any nature or character

whatsoever, on account of any personal injury or death to me while traveling over such lines, in said employment and service."

This provision is broad enough to include injuries resulting from the negligence of the appellee. As we have said, contracts made under the circumstances of the present case are not void as against public policy, and the same rules of construction should apply to them as to ordinary, valid stipulations: *Pittsburgh etc. Ry. Co. v. Mahoney*, 148 Ind. 196, 203, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464.

In the following cases, the language exempting the company from liability was not so strong as in the contract we are considering, yet it was held to include negligence by necessary implication: *Illinois etc. R. R. Co. v. Read*, 37 Ill. 486, 87 Am. Dec. 260; *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, 17 N. E. 633; *Hosmer v. Old Colony R. R. Co.*, 156 Mass. 506, 31 N. E. 652.

The cases cited by appellant, when carefully examined, are not inconsistent with this interpretation. In *New Jersey etc. Co. v. Merchants' Bank*, 6 How. 344, the provision for exemption was in a shipping contract. Such restrictions being against public policy, as above shown, when found in agreements for the transportation of goods, should be strictly construed.

³¹⁹ In *Rosenfeld v. Peoria etc. Ry. Co.*, 103 Ind. 121, 53 Am. Rep. 500, the liability exemption clause was in an abbreviated form, and illegible at the time the shipper received the contract, he having neither seen nor understood the abbreviations. It was held there was no exemption from liability for negligence.

The following cases from the New York court of appeals are also relied upon by appellant as establishing the necessity for a rule of strict construction in the case at bar: *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Blair v. Erie Ry. Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Mynard v. Syracuse etc. R. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28; *Holsapple v. Rome etc. R. R. Co.*, 86 N. Y. 275; *Nicholas v. New York etc. R. R. Co.*, 89 N. Y. 370; *Kenney v. New York etc. R. R. Co.*, 125 N. Y. 422, 26 N. E. 626.

The law in New York has long been that contracts containing exemptions from liability for negligence are valid, though made with shippers or passengers. As a reaction against a rule which the courts of that state regard as unfortunate, and which does not prevail in Indiana, the counter-doctrine has been introduced that, unless liability for negligence is expressly included, it will not be implied. As the rule does not obtain in this state, the cases involving the exception are irrelevant: See *Pittsburgh etc. Ry. Co. v. Mahoney*, 148 Ind. 196, 200, 201, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464.

The learned counsel for appellant cite the case of *Jones v. St. Louis etc. R. R. Co.*, 125 Mo. 666, 46 Am. St. Rep. 514, 28 S. W. 883, which holds that a porter upon a sleeping-car is a passenger, entitled to protection from the negligence of the transportation company, and that a contract of release from such liability is no bar to his recovery. It does not appear from the reported decision how the objection to the release arose, and the discussion of the proposition here involved is brief and unsatisfactory. The court assumes that the same rule applies to express messengers and to sleeping-car porters; but, as will be seen from recent ³²⁰ decisions in this state, such contracts as the present are valid when entered into respecting express agents. We do not regard the case as controlling in its authority, and, even were it applicable to the present controversy, we are not inclined to follow it.

There being no error in the action of the lower court in overruling the separate demurrers to the second and third paragraphs of answer, the judgment is affirmed.

A Carrier may Restrict its Liability by special contract, although it cannot thus exonerate itself from the consequences of its own negligence: *Willock v. Pennsylvania R. R. Co.*, 166 Pa. St. 184, 45 Am. St. Rep. 674, 30 Atl. 948; *Reid v. Evansville etc. R. R. Co.*, 10 Ind. App. 385, 53 Am. St. Rep. 391, 35 N. E. 703; *Davis v. Chicago etc. Ry. Co.*, 93 Wis. 470, 57 Am. St. Rep. 935, 67 N. W. 16, 1132; *Williams v. Oregon etc. R. R. Co.*, 18 Utah, 210, 72 Am. St. Rep. 777, 54 Pac. 991.

Carrier.—One Riding Free is not by reason thereof precluded from recovering from the carrier for injuries resulting from its negligence: See the monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 87-89; *Williams v. Oregon etc. R. R. Co.*, 18 Utah, 210, 72 Am. St. Rep. 777, 54 Pac. 991.

Carriers.—One Whom a Railway Corporation is under no legal obligation to carry in the manner in which he was carried at the time of an accident, is not entitled to enforce against the corporation the obligation and liability of a common carrier: *Robertson v. Old Colony R. R. Co.*, 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650. A railway company contracting to transport a menagerie in the cars of the owners thereof, is not liable as a common carrier, and may stipulate for exemption from liability: *Coup v. Wabash etc. Ry. Co.*, 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215. And a railway corporation may, by contract with an express company and its messengers, exempt itself from liability for injury to such messengers, however caused, while they are in charge of express matter on its trains: *Louisville etc. Ry. Co. v. Keefer*, 146 Ind. 21, 58 Am. St. Rep. 348, 44 N. E. 796. But see *Blair v. Erie Ry. Co.*, 66 N. Y. 313, 23 Am. Rep. 55. But it is held in *Jones v. St. Louis etc. Ry. Co.*, 125 Mo. 666, 46 Am. St. Rep. 514, 28 S. W. 883, that a porter of a Pullman palace-car is a passenger, so far as the careful running and management of the train are concerned.

ISENHOUR v. STATE.

[157 Ind. 517, 62 N. E. 40.]

APPEAL—CONSTITUTIONAL QUESTIONS NOT REVIEWABLE.—One convicted of violating a penal statute has no right, on appeal, to have constitutional questions under the law decided that do not arise in his case, and in which he has no interest. (p. 230.)

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.—A provision of a pure food law that within ninety days after its passage the state board of health shall adopt measures to facilitate its enforcement, and prepare rules regulating standards, defining adulterations, and declaring methods of collecting and examining foods and drugs, is not a delegation of legislative power. (pp. 230, 232.)

PURE FOOD LAW—WHEN TAKES EFFECT.—A provision of a pure food law that within ninety days after its passage the state board of health shall adopt measures to facilitate its enforcement does not postpone the taking effect of the law until this duty is performed. (pp. 230, 231.)

THE CONSTITUTIONALITY OF A STATUTE WILL BE UPHELD, unless its repugnance to the constitution is so manifest as to remove all reasonable doubt. (p. 233.)

CONSTITUTIONAL LAW—TITLE OF ACT.—While it serves no useful purpose to embrace in the caption of a statute anything but the general subject of the act, a statement of the subsidiary means and methods to be pursued in attaining the end or purpose of the law does not make the title bad. (p. 233.)

CONSTITUTIONAL LAW—TITLE OF PURE FOOD ACT.—A statute forbidding the manufacture and sale of adulterated food, drugs, and drinks, defining such articles, prescribing the duties of the state board of health in relation thereto, and declaring penalties for the violation of the law, is not violative of the constitutional requirement that every act shall embrace but one subject, which shall be expressed in its title. (pp. 232, 234.)

PENALTIES.—THE IMPOSITION OF A PENALTY, IN A STATUTE, for the doing of an act, is equivalent to a positive prohibition of the act. (p. 234.)

ADULTERATION OF FOOD.—AN AFFIDAVIT CHARGING that the defendant "had in his possession, with intent to sell the same, one pint of milk then and there adulterated with a certain substance injurious to health, to wit, formaldehyde," is not bad for want of an allegation that formaldehyde is either poisonous or injurious to health. (p. 235.)

ADULTERATION OF FOOD.—AN AFFIDAVIT CHARGING one with having the possession of adulterated milk need not allege that it was adulterated by him. (p. 235.)

ADULTERATION OF FOOD—WHO MAY PROSECUTE FOR.—A provision of a pure-food law imposing the duty to enforce it upon the state board of health does not exclude individuals from making complaint of an offender. (p. 235.)

ADULTERATION OF FOOD.—IN AN AFFIDAVIT CHARGING one with the possession, with intent to sell, of adulterated milk, it is not necessary to allege that the milk violates some rule, ordinance, or standard prescribed by the state board of health, under a statute imposing on such board the duty to prescribe rules and standards. (p. 235.)

ADULTERATION OF FOOD.—THE PROVISIO OF A PURE FOOD LAW need not be alleged in an affidavit charging a violation of the statute. (p. 235.)

EXPERT WITNESS—QUALIFICATIONS OF.—A scientific witness may testify, though his knowledge is derived from reading and conversations, and not from experiments and personal demonstrations. (p. 236.)

EXPERT TESTIMONY.—IF A WITNESS EXHIBITS SUCH KNOWLEDGE, gained from experiments, observation, standard books, or other reliable source, as to make it appear that his opinion is of some value, he is entitled to testify, leaving to the court, in its discretion, to say when such knowledge is shown, and to the jury what the opinion is worth. (p. 236.)

ADULTERATION OF FOOD.—IF ONE IS FOUND IN THE POSSESSION of adulterated milk, under circumstances from which it may be inferred that the adulteration is recent, it is incumbent on him, in a prosecution therefor, to show that the adulteration was without his knowledge. (pp. 237, 239.)

ADULTERATION OF FOOD—EVIDENCE.—IF A MILK VENDER uses a "preserver," what he did to ascertain whether it is an adulterant is admissible in evidence, in a prosecution for selling adulterated milk, in explanation of his assertion that he did not know the milk was adulterated. And if he thereby overcomes the presumption of guilty knowledge raised by the possession of adulterated milk, he should be acquitted. (pp. 238, 239.)

R. O. Hawkins and H. E. Smith, for the appellant.

W. L. Taylor, attorney general, "Merrill Moores and C. C. Hadley, for the state.

519 HADLEY, J. Appellant was convicted on an affidavit charging him with "unlawfully and knowingly having in his

possession, with intent to sell the same, a certain substance ⁵²⁰ intended for food, to wit, one pint of milk then and there adulterated with a certain substance injurious to health, to wit, formaldehyde." Appellant's motions to quash the affidavit and for a new trial were overruled. Section 2 of the act of 1899, commonly known as the pure food law (Acts 1899, p. 189) in part provides: "Whoever fraudulently adulterates, for the purpose of sale, bread or any other substance intended for food with any substance injurious to health, or knowingly barter, gives away, sells, or has in his possession with intent to sell, any substance injurious to health, shall be fined in any sum not exceeding one hundred dollars."

I. It is insisted that this act violates the following provisions of the state constitution: 1. Section 21, article 1, which provides that "no man's property shall be taken by law without just compensation"; 2. Section 25, article 1, which provides that "no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution"; 3. Section 19, article 4, which provides that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

1. From the beginning it should be borne in mind that appellant is charged with having in his possession adulterated milk with intent to sell the same, in violation of law. This and nothing more. He has the right, therefore, to call upon this court to review his conviction upon this particular charge, but he has no right to ask us to decide questions under the pure food law that do not arise in his case, and in which he has no special interest: *Henderson v. State*, 137 Ind. 552, 564, 36 N. E. 257; *Fessler v. Brayton*, 145 Ind. 71, 84, 44 N. E. 37; *Pittsburgh etc. R. R. Co. v. Montgomery*, 152 Ind. 1, 13, 71 Am. St. Rep. 301, 49 N. E. 582.

It is not disclosed by the affidavit that appellant had any property taken at all, or how the evidence against him was procured, nor is it necessary to the validity of the affidavit that it should be so disclosed; neither ⁵²¹ can it be assumed that it was procured by a sample of the milk obtained in the way pointed out by the statute, as that method does not exclude competent evidence from any other proper source. Appellant

is not being tried for resisting a seizure of his property, and it is therefore immaterial in this case whether the act of 1899 provides for the taking of property without just compensation. The only constitutional question that concerns the appellant is whether the penal provision of the act of 1899 under which he has been convicted has been enacted in the observance of constitutional requirements.

2. Does the act violate section 25, article 1, providing that "no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution?" The pure food law provides that "within ninety days after the passage of this act the board of health shall adopt such measures as may be necessary to facilitate the enforcement thereof, and shall prepare rules and ordinances, where and when necessary, regulating minimum standards of foods and drugs, defining specific adulterations, and declaring the proper methods of collecting and examining drugs and articles of food." From this provision it is argued that the law could not become effective and "could not be violated until the state board met, within ninety days, prepared its rules, and passed its ordinances, regulating minimum standards, defining adulterations, and declaring the methods of collecting and examining foods," and is, in substance, an attempted delegation of legislative power to the state board of health. The obvious purpose of the provision last quoted was to commit to a body of learned and scientific experts the duty of preparing such rules and prescribing such tests as may from time to time, in the enforcement of the law, be found necessary in determining what combination of substances are injurious to health, and to what extent, if at all, admixtures, or deteriorations of foods and drugs may go, without injuriously affecting the ⁵²² health of the consumer. That which is required of the state board of health has no semblance to legislation. It merely relates to a procedure in the law's execution for a reliable and uniform ascertainment of the subjects upon which the law is intended to operate. Nor does the duty imposed upon the state board in any sense postpone the taking effect of the law until the duty is performed. Performance can never be said to be complete. The duty is continuing, and will arise at any time when a new food or drug is put forward. Besides, it is

paradoxical to say that the law is not effective until the state board have acted, when it is certain that without the law they could not act at all. And to say their act puts the law in operation is to excuse them from acting, because no law requires it. This class of legislation emanates from an exercise of the police power of the state for the protection of the public health. The power of the legislature, and its right to determine, for itself, when an emergency for such legislation exists, and the means and instrumentalities necessary to accomplish the end in view, is no longer a doubtful question. The peculiar character of the subject, embodying, as it does, considerations of sanitary science, is such as to require for just legal control something more than legislative wisdom, to designate accurately the subjects and instances intended to be affected. The classification of these subjects, and the prescribing of rules by which they may be determined by a qualified agent is not legislation, but merely the exercise of administrative power. The law itself is complete and effective in all its parts. In respect to the matters to be determined by the state board of health in its execution, it awaits the performance of these duties. When performed, the law operates upon the things done by the board. While unperformed, the law remains ready to be applied whenever the preliminary conditions exist.

It is said in *Blue v. Beach*, 155 Ind. 121, 80 Am. St. Rep. 195, 56 N. E. 92, on page 130 (155 Ind., 80 Am. St. Rep. 202, 56 N. E. 92): "In order to secure and promote the public health, the state ⁵²³ creates boards of health as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws, rules, and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities": See, also, *Overshiner v. State*, 156 Ind. 187, 83 Am. St. Rep. 187, 59 N. E. 468; *State v. Board of Pharmacy*, 155 Ind. 414, 58 N. E. 531; *Groesch v. State*, 42 Ind. 547, 556; *Lafayette etc. R. R. Co. v. Geiger*, 34 Ind. 185, 220.

3. Is the title of the act multifarious, and in conflict with the constitutional requirement that "every act shall embrace

but one subject and matters properly connected therewith, which subject shall be expressed in the title?" The title of the act is as follows: "An act forbidding the manufacture, sale, or offering for sale of any adulterated foods or drugs, defining foods and drugs. Stating wherein adulteration of foods and drugs consists, and defining the duties of the state board of health in relation to foods and drugs, their inspection, purity, adulteration, declaring penalties for the violation of the laws, rules, and ordinances concerning foods and drugs, also liquors used or intended for drink, repealing acts in conflict therewith."

It must be conceded that this title is unskillfully drawn, and contains much unnecessary verbiage. This, however, does not necessarily make it bad. It is contended that there are three distinct subjects expressed: 1. Adulteration of foods; 2. Adulteration of drugs; and 3. Adulteration of liquors used or intended for drink. It has been many times declared by this court that in deciding questions as to the ⁵²⁴ constitutionality of a statute, the law will be upheld unless its repugnance to the constitution is so manifest as to remove all reasonable doubt: *Gustavel v. State*, 153 Ind. 613, 54 N. E. 123, and cases cited.

In the case before us it is readily seen that the subject of the act, and the only subject, is the protection of the people from imposition as a result of harmful adulteration of certain things consumed by them. The entire scope of the law might have been sufficiently expressed as "an act concerning adulterations," or as "an act for the protection of the people against adulterations." It is not essential to a good title that the subject of the act shall be expressed in exact terms; it is sufficient if the subject is fairly deducible from the language employed. And while it serves no useful purpose to embrace in the caption anything but the general subject of the act, a statement of the subsidiary means and methods to be pursued in attaining the end or purpose of the law does not make the title bad. The proper test in all questions of this sort is, Does the body of the particular legislation embrace more than one general subject, and such matters as are calculated to assist in reaching the single object intended, and is that subject disclosed by the title? If, thus tested, it appears that an act embraces but one subject and matters properly connected therewith, and that that subject is shown by the title, it must be held to be constitutional; otherwise not. Forbidding the

manufacture and sale of any adulterated foods, drugs or drinks, defining prohibited foods, drugs, and drinks, and the duties of the state board of health in relation to the inspection and prescribing of standards of purity of foods, drugs, and drinks, and declaring penalties for the violations of the law, are all matters clearly tending to a common end, and which unmistakably disclose what that end is. The title of the pure food law of Minnesota reads: "An act in relation to the manufacture and sale of baking-powders, sugars and syrups, vinegars, lards, spirituous and ⁵²⁵ malt liquors, to prevent fraud, and to preserve the public health": Minn. Gen. Laws 1889, p. 48. The supreme court, in trying the act by their constitutional provision similar to ours, say: "The act does not embrace more than one subject, within the meaning of the constitutional prohibition. The act may be fairly designated as one relating to the adulteration of various articles of food and drink, and its provisions are properly related to that general subject": *Stolz v. Thompson*, 44 Minn. 271, 46 N. W. 410. See, *Gustavel v. State*, 153 Ind. 613, 54 N. E. 123; *Central Union Tel. Co. v. Fehring*, 146 Ind. 189, 45 N. E. 64; *State v. Gerhardt*, 145 Ind. 439, 458, 44 N. E. 469; *Henderson v. State*, 137 Ind. 552, 558, 36 N. E. 257.

II. It is next contended that the facts stated in the affidavit are insufficient, for many reasons, to constitute an offense against the laws of the state.

(a) The first and prohibitory section of the act provides "that no person shall, within this state, manufacture for sale, offer for sale, or sell, any drug or article of food which is adulterated within the meaning of this act." It will be noted that the things prohibited by this section do not include the "having in possession with intent to sell." In the second and penalty section it is provided that "whoever . . . knowingly . . . has in his possession with intent to sell, any substance injurious to health, shall be fined," etc. It is claimed that because the act with which appellant is charged—"having in his possession with intent to sell"—not being one of the things enumerated in the prohibitory section of the law, the mere affixing of a penalty to the act in a subsequent section does not make it unlawful and punishable. The claim cannot be allowed. It will not do to say, in such cases, that the legislature intends to inflict a penalty for the doing of a lawful act, and hence it is held that the imposition of a penalty for the doing of an act is equivalent to a positive prohibition of the act:

Skelton v. Bliss, 7 Ind. 77; Bartlett v. Viner, Skin. 322; Mitchell ⁵²⁶ v. Smith, 1 Binn. 110, 113, 2 Am. Dec. 417; In re City of Buffalo, 68 N. Y. 167, 173; Black on Interpretation of Laws, 65; Sutherland on Statutory Construction, secs. 335, 336.

(b) There is no substance in the contention that the affidavit is bad for want of an allegation that formaldehyde is either poisonous or injurious to health. It is averred that the defendant "had in his possession, with intent to sell the same, one pint of milk, then and there adulterated with a certain substance injurious to health, to wit, formaldehyde." This is sufficient.

(c) The same may be said of the objection to the affidavit because it contained no averment that the milk was adulterated by the defendant. If the defendant knowingly had in his possession adulterated milk with intent to sell the same, it was not of the slightest consequence who adulterated it.

(d) The next objection to the affidavit is that it does not disclose that the prosecution was begun by the state board of health as required by the law. The act provides (section 2) "it shall be the duty of the state board of health to enforce the laws of this state governing food and drug adulterations." Similar provisions are found in the medical law (Acts 1897, p. 259), and in the dental law (Acts 1899, p. 482), and are very common in the laws of other states. We cannot believe that the general assembly, by imposing a special duty upon specified officers to enforce the statute, meant that individuals should be excluded from making complaint. The law is general, and has a general application. The interdictions prescribed by the act are for the public welfare, as much for one as for another, and it cannot be assumed that the legislature by conferring a duty upon certain officers to enforce the law intended that its enforcement should depend wholly upon the pleasure or discretion of such officers. We see no reason for distinguishing this from other public offenses, in its general object and purpose, or why anyone entitled to the law's protection ⁵²⁷ may not institute its enforcement, as he may, ordinarily, do in other cases. The evident intent was to confer upon the state board of health official duty, in addition to common individual right, to put the law in motion in proper cases: Commonwealth v. Gay, 153 Mass. 211, 217, 26 N. E. 571, 852; Commonwealth v. McDonnell, 157 Mass. 407, 32 N. E. 361.

(e) The affidavit is further assailed because it does not charge that the state board of health had fixed a standard of purity, nor that the milk in defendant's possession violated the standard, as provided by the act. Appellant is not charged with violating a standard. And the character of the act for which he is prosecuted is not determined by a standard. He is called upon to answer for having in his possession with intent to sell milk adulterated with a substance injurious to health. The having in possession with intent to sell adulterated food that may in any material degree injuriously affect the health of the consumer is positively forbidden by that provision of the law under which appellant is prosecuted. Whether or not the state board of health had fixed standards of purity in the matters required of them cannot avail one as a defense to a charge in which no standard is required.

(f and g) It was not necessary for the affidavit to show that the state board of health had prepared rules and ordinances, and defined adulterations, and that the milk in possession of appellant violated some rule, ordinance, or standard. The offense with which appellant is charged is independent of all action of the board, and is not affected by anything they may do or leave undone.

(h) This objection is like the preceding, and for the same reason is invalid.

(i) The last objection to the affidavit is that the proviso of section 1 is not pleaded. This was not necessary: *Ferner v. State*, 151 Ind. 247, 51 N. E. 360. The affidavit was sufficient.

III. Five reasons for a new trial are argued: 1. John F. Geis, a witness for the state, testified that he was by profession ⁵²⁸ a chemist, had been practicing his profession for between ten and fifteen years, and was and had been also a practicing physician for eight years; he had examined the milk in question for, and had found therein, formaldehyde; he knew the effect of formaldehyde on the caseine of milk; this knowledge was acquired, not from experiments, but wholly from reading, study, and conversations with other physicians. The question was then propounded: "What is the effect of formaldehyde on milk as a substance of food?" To which appellant objected for the reason that the witness had only shown knowledge from reading and conversations with others, and not from experiments, and therefore was not a competent and qualified witness on the subject. The witness was permitted to answer. Courts have never undertaken to set up a standard of scientific

knowledge by which the competency of a witness may be determined, and have not gone to the extent of holding that a scientific witness can only testify from facts learned by him from personal demonstration. The general rule, in such cases, in this state at least, seems to be that where a witness exhibits such a degree of knowledge, gained from experiments, observation, standard books, or other reliable source, as to make it appear that his opinion is of some value, he is entitled to testify, leaving to the trial court, in the exercise of a sound discretion, the right to say when such knowledge is shown, and to the jury the right to say what the opinion is worth; and, as in all other cases of discretion, this court will review the action of the trial court only when that discretion clearly appears to have been abused: *Jenney Electric Co. v. Branham*, 145 Ind. 314, 320, 41 N. E. 448; *Parker v. State*, 136 Ind. 284, 288, 35 N. E. 1105; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 550, 13 N. E. 686; *City of Ft. Wayne v. Combs*, 107 Ind. 75, 85, 57 Am. Rep. 82, 7 N. E. 617; *Carter v. State*, 2 Ind. 617; *Shover v. Myrick*, 4 Ind. App. 7, 16, 30 N. E. 207. It is clear that there was no abuse of discretion in this instance.

2. At the conclusion of the state's evidence appellant⁵²⁹ moved the court to instruct the jury to return a verdict for him on the ground that no knowledge had been shown in the defendant of the presence of formaldehyde in the milk. The refusal of the court to give this instruction is complained of. The statute is: "Whoever knowingly . . . has in his possession," etc. It must be conceded that under a plea of not guilty it was incumbent upon the state to satisfy the jury beyond a reasonable doubt that the defendant knew there was formaldehyde in the milk. But it was not essential that this proof should be positive and direct. It was sufficient if the state had proved a state of facts from which knowledge might be reasonably and naturally inferred. And it was the duty of the court to overrule appellant's motion if there were such facts in evidence as were calculated to support inferences of guilty knowledge.

The record discloses no direct evidence of knowledge, but it is shown that about 10 o'clock A. M., in the month of July, appellant was found with his milk wagon in the streets of Indianapolis, and, upon demand, gave up to the dairy inspector a pint of milk, appellant saying, as a protest of the demand, that it was the last quart of milk he had, and if it was taken he would be required to purchase other milk to serve his last

customer. The milk so surrendered was found to contain formaldehyde. From this it appears that in the middle of the forenoon, in the hot season, appellant had the adulterated milk in his exclusive possession with intent to sell and deliver it to a customer. It is a thing in the common knowledge of the people, and hence known to the court, that milk is a substance that will not in warm weather remain in a merchantable condition, as sweet milk, more than a few hours, and that it very soon becomes unfit for food (*Ross v. Boswell*, 60 Ind. 235), and it might therefore have been inferred that the particular milk in question had been drawn and in the possession of appellant but a short time. Under such circumstances, in the absence of any explanation of how ⁵³⁰ the recently drawn, and, consequently, recently adulterated, milk came into appellant's possession, the jury had the right to determine the strength of the inference that would naturally arise therefrom. Being found in exclusive possession of milk recently adulterated made it incumbent upon appellant to show that it was not adulterated by him. His situation seems to us precisely analogous to that of one found in the possession of recently stolen goods, or of counterfeit money. With respect to stolen property, it was said by this court in *Johnson v. State*, 148 Ind. 522, 47 N. E. 926, on page 524 (148 Ind., 47 N. E. 926): "When it is proved that property has been stolen, and the same property, recently after the larceny, is found in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession, and of showing that such possession was innocently acquired; and if he fails to so satisfactorily account for such possession, or gives a false account, the presumption arises that he is the thief": See, also, *Madden v. State*, 148 Ind. 183, 187, 47 N. E. 220; *Campbell v. State*, 150 Ind. 74, 76, 49 N. E. 905; *Goodman v. State*, 141 Ind. 35, 39 N. E. 939. Appellant's motion to instruct the jury was properly overruled.

3. Appellant was permitted to testify that he never used any formaldehyde, and that the milk in question had no formaldehyde in it to his knowledge; that he did the same morning before leaving home put a teaspoonful of a substance known as "Palmer's Preserver" in nine gallons of milk, of which the sample in controversy was a part; that upon inquiry, Palmer had previously told him that the preserver had no formaldehyde in it. He was then asked by his attorney to state, "What representations were made to you, either in print, writing, or verbally, or in any other way, as to this preservative, prior to

the time you used it?" Upon the state's objection that the question asked called for hearsay, appellant was denied the right to answer. In the same connection appellant offered in evidence a printed circular accompanying the "Palmer's Preserver" when the same was ⁵³¹ purchased by the defendant. Among other things, it was stated in the circular: "Perfectly harmless, odorless, tasteless, and cheap. Guaranteed to contain no acid or injurious ingredient. . . . Remember this is positively not an adulterant." This circular was also refused. While the possession of milk recently adulterated with a substance injurious to health required appellant to show affirmatively that such adulteration was without his knowledge, yet he was entitled to the fullest opportunity to do so. If, in fact, he had no knowledge, and had a sufficient excuse for want of knowledge, he was entitled to show it. The law will not permit the state to construct about a defendant a circumstantial case, and then deny him an opportunity to explain the circumstances consistently with his innocence. If appellant used the preserver, honestly believing, after making reasonable inquiry and investigation, that it contained no formaldehyde or other substance injurious to health, then he was not guilty of "knowingly," etc. What he did to ascertain the fact about it, who he inquired of, what was said to him by others in whom he might reasonably confide, what was exhibited to him, in writing or printing, and the trustworthiness thereof, were all proper subjects to lay before the jury in explanation of his assertion that he did not, at the time, know the milk contained a substance injurious to health; and if the facts he was thus able to show should be sufficient to overcome the presumption of guilty knowledge raised by the possession, it would have been the duty of the jury to acquit.

It should be borne in mind that this prosecution was under the pure food act of 1899. If it had been under the act of 1901 (Acts 1901, p. 429; Burns' Rev. Stats. 1901, secs. 2165a, 2165b), a very different question as to knowledge would arise.

We are unable to say that the exclusion of the proffered evidence worked no harm to the defendant, and for this reason the cause must be reversed.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

Boards of Health.—Powers which may be delegated to boards of health are considered in the monographic note to *Blue v. Beach*, 80 Am. St. Rep. 212-234.

Every Statute is Presumed Constitutional: Alabama etc. *R. R. Co. v. Reed*, 124 Ala. 253, 82 Am. St. Rep. 166, 27 South. 19. Legislative acts are to be upheld in all cases of doubt: *Overshiner v. State*, 156 Ind. 187, 83 Am. St. Rep. 187, 59 N. E. 468; *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851. They should not be declared unconstitutional unless the violation of the constitution is so manifest as to leave no room for reasonable doubt: *State v. Layton*, 160 Mo. 474, 83 Am. St. Rep. 487, 61 S. W. 171; *Hanna v. Young*, 84 Md. 179, 57 Am. St. Rep. 396, 35 Atl. 674.

Title of Statute.—A constitutional requirement that a statute shall embrace but one subject, which shall be expressed in its title, is complied with if the general object of an act is so expressed: *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851. The enumeration of the details of the subject is not fatal, however, if they constitute but parts of one subject, and of matters germane thereto: See the monographic note to *Crookston v. County Commrs.*, 79 Am. St. Rep. 464-467. See, further, on the sufficiency of titles to statutes, the monographic note to *Bobel v. People*, 64 Am. St. Rep. 70-107.

A Penalty Inflicted by a Statute upon the commission of an act implies a prohibition of it as an offense: *Mitchell v. Smith*, 1 Binn. 110, 2 Am. Dec. 417.

The Possession of Property recently stolen raises a presumption of guilt, which, if not rebutted, will warrant a conviction of larceny: *Huggins v. People*, 135 Ill. 243, 25 Am. St. Rep. 357, 25 N. E. 1002; *State v. Guild*, 149 Mo. 370, 73 Am. St. Rep. 395, 50 S. W. 909. Compare *State v. Gillespie*, 62 Kan. 469, 84 Am. St. Rep. 411, 63 Pac. 742.

Expert Testimony.—Knowledge derived exclusively from books and study, without actual personal experience, may be sufficient to qualify one as an expert witness, where the matter is one of real science: See the monographic note to *Hammond v. Woodman*, 66 Am. Dec. 232. It is for the court to determine in the first instance whether a witness offered as an expert possesses the proper qualifications, but the value of the testimony he may give is for the jury: *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552, 12 S. W. 510.

ADAM, MELDRUM & ANDERSON CO. v. STEWART.

[157 Ind. 678, 61 N. E. 1002.]

A CHATTEL MORTGAGE TO SECURE AN ANTECEDENT DEBT will not be sustained against a vendor who has been induced to part with the mortgaged property by the fraud of the mortgagor. (p. 242.)

A CHATTEL MORTGAGE BY A FRAUDULENT VENDEE is valid as to a mortgagee of the goods, who, in consideration of the mortgage, and without notice of the fraud, has extended the time of payment of his debt, or assumed any new or additional obligation. (p. 243.)

SALE—FRAUD OF BUYER.—A VENDOR OF GOODS CANNOT maintain replevin for their recovery, on the ground that the sale was induced by fraud, without returning or tendering the amount received on account of the sale. (p. 243.)

J. B. Kenner and U. S. Lesh, for the appellant.

W. P. Breen and John Morris, for the appellees.

⁶⁷⁸ HADLEY, J. Appellant, a corporation, as a vendor, brought replevin to recover of the mortgagee of its vendee certain merchandise alleged to have been fraudulently purchased. The venue was changed to the Wabash circuit court. Judgment for the appellees. No question arises upon the pleadings. The only error assigned is the overruling of appellant's motion for a new trial, which challenges the sufficiency of the evidence to support the finding and certain rulings of the court on proffered testimony.

The material undisputed facts follow: Appellee Stewart, on the twenty-sixth day of November, 1897, was engaged as a retail dry-goods merchant in Huntington, Indiana; for several ⁶⁷⁹ years he had bought most of his goods of appellant, engaged in the wholesale dry-goods business in Buffalo, New York. February 18, 1895, when he was establishing his business at Huntington, he borrowed \$5,000 of his wife, Isa A. Stewart, for which he executed to her, on that date, his note bearing six per cent interest from date until paid. Soon after the beginning of his business at Huntington, Stewart opened an account with appellant for goods, which, at the close of 1896, he had suffered to run against him for about \$4,000. At this time he had never submitted, nor been requested to submit, to appellant a statement of his assets and liabilities, but upon the receipt from appellant of a semi-annual statement of his account, Stewart voluntarily, in explanation of his default in payments, on January 7, 1897, made in writing a statement showing \$10,500 capital over liabilities, which, at best, was erroneous by the amount he owed his wife, and \$2,000 to the First National Bank of Huntington. Appellant's credit man testified that, believing and relying upon the truth of the statement, he extended indulgence, and thereafter, beginning on February 13, 1897, and ending October 27, 1897, in the usual course of trade the house sold Stewart, by a traveling salesman, forty-three additional bills, ranging from \$6.83 to \$602, and aggregating \$6,115. In the same period, Stewart made appellant divers payments on account amounting to \$3,397, and returned goods, not ordered, on several occasions, amounting to \$189, and as testified by Stewart, and which seems not to have been denied, on November 15, 1897, paid appellant on the goods sued for \$257. On June 5, 1897, Stewart again

wrote appellant, "our liabilities outside of yourselves are less than ever, and are simply nominal." In the autumn of 1897, appellant urged Stewart to secure his indebtedness, and on November 26, 1897, he executed three notes, one to his wife for \$5,831, being a renewal of her former note, with interest accrued to date; one to Breen for \$500, being for past and then contracted indebtedness, and one to Eisenhauer ⁶⁸⁰ for \$85 for rent then due, each of said three notes made payable in bank at one day after date, and at the same time executed to appellee Schuckman, as trustee, a chattel mortgage on his entire stock in trade, to secure said three notes and one payable to the First National Bank of Huntington, of previous date, for \$1,500. Schuckman took immediate possession under the mortgage. On the following day, November 27th, appellant brought this suit against Schuckman, trustee, and Stewart to recover all goods sold to Stewart after the erroneous statement of January 7, 1897.

These facts, it is argued, show: 1. That Stewart got possession of the goods delivered to him by the appellant between the dates of January 7th and November 26, 1897, by such active fraud as empowered appellant to rescind the contracts of sale, and retake the goods; and 2. That they do not show that the beneficiaries of the chattel mortgage to Schuckman, trustee, are innocent purchasers for value within the meaning of the law. The first of these propositions becomes immaterial if the second should be determined against appellant's contention. No claim is made that either of the debts secured by the mortgagor is invalid, or that either of the mortgage beneficiaries had any notice or knowledge of the false representations made by Stewart to appellant.

It may be stated as a general rule that a mortgage made to secure an antecedent debt will not be sustained against a vendor who has been induced to part with the mortgaged property by the fraud of the mortgagor. In such cases equity will restore to the defrauded vendor that which is rightfully his, when in the doing it only takes from the mortgagee the advantage of his security, which has cost him nothing, and leaves to him unimpaired all his rights under the original contract: *Curme, Dunn & Co. v. Rauh*, 100 Ind. 247; *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497, 45 N. E. 645; *Cobbey on Replevin*, sec. 286, and cases cited; *Tiffany on Sales*, 122, and cases cited; *Burdick on Sales*, 169.

⁶⁸¹ But a mortgage executed by a fraudulent purchaser upon goods that have come into his possession in the usual course of trade, and over which he has continued to exercise dominion, and give forth the appearances of ownership, by mixing and exposing them to sale with his other goods, will be held valid as to a mortgagee, who, in consideration of the mortgage and without notice of the fraud, has extended the time of payment of his debt or assumed any new or additional obligation: *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *United States etc. Co. v. Harris*, 142 Ind. 226, 238, 10 N. E. 1072; *Root v. French*, 13 Wend. 570, 28 Am. Dec. 482; *Mears v. Waples*, 3 Houst. 581; *Shufeldt v. Pease*, 16 Wis. (*659) 689; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Cobbey on Replevin*, sec. 415; *Tiedeman on Sales*, sec. 327.

The facts of the case are that, in consideration of the mortgage, Mrs. Stewart accepted a renewal of her note, and extended the time of payment of her debt; Eisenhauer accepted a note and extended the time of payment of his past due account; Breen accepted a note for \$500, payable in bank one day after date, \$250 of which was for a past due account, and \$250 for legal services then contracted for, to be then and thereafter rendered. These persons having no notice of Stewart's fraud in the purchase of the goods, if there was any, and having all surrendered the right to sue their debtor for a definite period, and Green having assumed a new obligation, must be classed as innocent purchasers for value within the rule above stated. The fact that the mortgage to the First National Bank of Huntington rested solely upon a pre-existing debt cannot affect the decision of the case. Schuckman's possession of the property as the trustee of Mrs. Stewart, Eisenhauer, and Breen is rightful, and replevin will not lie against one legally in possession in favor of one who has no superior right.

The judgment of the circuit court is right for another reason. It is a familiar rule that a contract induced by fraud is not void, but voidable only at the option of the party ⁶⁸² defrauded. It rests solely with the defrauded party to say whether or not the contract shall stand, and until repudiated by him it is valid. He may abide the contract and seek redress in damages; or, if he acts within a reasonable time after discovery of the fraud, he may rescind the contract, and reclaim his property. But if he elects to rescind there must be a complete restoration of everything of value the party de-

frauded has received under the contract. He will not be permitted to undo the contract while retaining money, or other valuable thing, delivered him under its terms: *Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16; *Haase v. Mitchell*, 58 Ind. 213; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Tiffany on Sales*, 119; *Tiedeman on Sales*, sec. 163.

It is shown by the record that Stewart testified that on November 15, 1897, eleven days before the execution of the mortgage to Schuckman, trustee, and nine months after the first purchase of goods subsequent to the January 7, 1897, statement of assets and liabilities complained of, he paid appellant on the goods sued for \$257. It does not appear that the testimony was denied by appellant, and must be accepted as true. The sum thus paid was not returned or tendered to appellees before the commencement of this suit, which of itself is fatal to appellant's right of recovery.

The propositions arising upon the admission and rejection of testimony relate exclusively to the question of Stewart's fraud, which we have found unnecessary to consider.

Judgment affirmed.

Mortgage.—A Pre-existing Debt is a sufficient consideration for a mortgage: *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117, 79 N. W. 255. See, also, *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497, 45 N. E. 645, 47 N. E. 24. This rule applies to chattel mortgages: *Henry v. Vliet*, 33 Neb. 130, 29 Am. St. Rep. 478, 49 N. W. 1107; *Union Nat. Bank v. Olum*, 3 N. Dak. 193, 44 Am. St. Rep. 533, 54 N. W. 1034. And a creditor who takes a mortgage in consideration of the extension of the time of payment of a pre-existing debt is a purchaser for a valuable consideration: *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

Sale—Rescission.—A vendor who seeks to have a contract of sale set aside upon the ground of fraud must offer to return the purchase money in order to put the vendee in statu quo: *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212. See, also, *Wilcox v. San Jose etc. Co.*, 113 Ala. 519, 59 Am. St. Rep. 135, 21 South. 376. He need not offer to return what he has received, however, if the fraudulent vendee has rendered a return unjust: *Phenix Iron Works v. McEvony*, 47 Neb. 228, 53 Am. St. Rep. 527, 66 N. W. 290.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

**CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. KINSLEY.**

[27 Ind. App. 135, 60 N. E. 169.]

RAILWAY TICKET—TIME LIMIT.—If the holder of a round-trip ticket starts on his return within the time therein limited, but stops at an intermediate station to change cars to another division of the railroad, and while he there waits for the train his ticket expires, he is entitled to continue his journey, and may hold the railway company liable for denying him admission to its train. (pp. 245, 255.)

A RAILWAY TICKET MUST BE GIVEN A CONSTRUCTION most favorable to the passenger. Courts look with disfavor on a construction which will work a forfeiture of the transportation purchased. (pp. 250, 251.)

RAILWAYS—EXCLUSION FROM TRAIN.—THE HUMILIATION suffered by a passenger in being wrongfully denied admission to a train is an element of the damages sustained. (p. 256.)

RAILWAYS—EXCLUSION FROM TRAIN—DAMAGES.—If, in an action for wrongfully denying a passenger admission to a train, the amount of compensatory damages recovered cannot be said to be excessive through improper motives of the trier, it will be allowed to stand. (p. 256.)

J. D. Dye, W. V. Stuart, E. P. Hammond, and D. W. Simms,
for the appellant.

J. F. Hanley and W. R. Wood, for the appellee.

130 BLACK, J. The appellee sued the appellant. A demurrer to the complaint for want of sufficient facts was overruled. The appellant answered in one paragraph, a demurrer to which was sustained. The appellant refusing to plead further, and electing to stand by its answer, the court ordered

judgment for the appellee. On the appellee's motion, and by consent of the appellant, the cause was submitted to the court for trial without a jury upon the question as to the amount of damages, which the court assessed at the sum of one hundred dollars. The appellant's motion for a new trial and its motion in arrest of judgment having been overruled, judgment was rendered for the amount assessed.

The complaint contained averments in substance as follows: The appellant owned, controlled, and operated, under one management, two different divisions or branches of railway, one line extending from Lafayette to Indianapolis, the other from Indianapolis to Muncie, all said places being regular stations for receiving and discharging passengers. A passenger traveling from Lafayette to Muncie or from Muncie to Lafayette over the appellant's route was compelled to change cars from one of said divisions to the other at Indianapolis, where the appellant maintained a depot and ¹³⁷ waiting-room, along its road, the tracks there being fenced off from the depot by an iron fence, and access from the waiting-room to the cars being had through said fence by means of gates, at which the appellant kept gatemen to examine the tickets of all persons offering themselves as passengers before permitting them to pass through the gates, the gatemen being charged by the appellant with the duty of accepting or rejecting all persons offering themselves as passengers on its trains. On the 3d of July, 1897, the appellee purchased of the appellant a ticket entitling him to be carried over said lines from Lafayette to Muncie, with a return coupon thereto attached entitling him to return as a passenger over said lines from Muncie to Lafayette. The return ticket was marked good until July 6, 1897, inclusive. The appellee was accepted as a passenger by the appellant upon its cars at Lafayette July 3, 1897, and was carried by virtue of the ticket upon one of the lines to Indianapolis, where he changed cars, and by virtue of said ticket was carried thence to Muncie. He started on the return trip from Muncie to Lafayette, and was accepted as a passenger by the appellant on its cars at Muncie, at 9:17 o'clock P. M., on the 6th of July, 1897. He presented the return ticket to the conductor in charge of the train, who accepted it, punched it, and returned it to the appellee, to be used by him on the division extending from Indianapolis to Lafayette. He arrived at Indianapolis at about 10:40 o'clock P. M. the same night, and got off the appellant's train on which he had come from Mun-

cie, for the purpose of changing cars and going upon the appellant's train on the other division to Lafayette, which change he was compelled to make to reach his destination as above shown. The first passenger train out of Indianapolis over the other line for Lafayette, after his arrival at Indianapolis from Muncie, was scheduled to leave at 12:30 o'clock A. M., July 7, 1897, which fact the appellee first learned after his arrival from Muncie. He went into the waiting-room and remained there until the train for Lafayette ¹³⁸ arrived, which was a few minutes after 12 o'clock the same night. This train under the appellant's rules was scheduled to stop at Lafayette, for the reception and discharge of passengers, and was the first train leaving Indianapolis after appellee's arrival from Muncie. Upon the arrival of this train appellee left the waiting-room and presented himself at the gates to be admitted to the appellant's cars as a passenger from Indianapolis to Lafayette. He presented the return ticket, or coupon, that had been accepted by the appellant for his return passage as aforesaid to appellant's gatekeeper, who, it was alleged, wrongfully refused to let the appellee pass through the gate for the purpose of entering upon the train. The appellee insisted and explained to the gatekeeper that the appellant had accepted the ticket for his continuous passage from Muncie to Lafayette. The conductor of the appellant in charge of the train for Lafayette was called, and he, it was alleged, wrongfully refused to honor the ticket, and informed the appellee that he would not carry the appellee to Lafayette on the train and accept the ticket for his passage, and that if the appellee got upon the train, relying upon the ticket for his passage, he would put him off; and the gatekeeper again wrongfully refused to permit the appellee to pass through the gate to the car, and he was prevented by the gatekeeper and the conductor from entering the car. The refusal of the gatekeeper and the refusal of the conductor to admit appellee to the train, and the giving of such information to him by the conductor were in the presence and hearing of a large number of other passengers assembled about the gate, and caused much humiliation, degradation, and distress of mind to the appellee. It was alleged that by reason of the failure and refusal of the appellant to accept the appellee as a passenger upon the train as aforesaid, and by reason of its failing and refusing to accept and honor the ticket as aforesaid, he was compelled to remain in Indianapolis until the following day at his expense, and was greatly delayed there-

by in ¹³⁹ his business, all to his damage in the sum of one thousand dollars. Wherefore, etc.

In the answer it was alleged that the ticket and coupon were sold by the appellant to the appellee as a Fourth of July excursion ticket and coupon for four dollars and thirty-five cents, which was only one-half of the rate usually charged for passage over the appellant's railroads from Lafayette to Muncie and return. The form of the ticket from Lafayette to Indianapolis and thence to Muncie was set out, as follows:

"Issued by the Cleveland, Cincinnati, Chicago & St. Louis R. Co. Big Four route. Fourth of July Excursion, 1897. Going coupon. One continuous passage. Lafayette, Ind., to Muncie, Ind., via short line only. Good only on trains scheduled to stop July 3d, 4th, or 5th, 1897. Date of sale stamped on back. Void if detached from return coupon. Form J. E. 3." The date of sale of the ticket, July 3, 1897, was stamped on its back. The form of the return coupon attached to the ticket was given as follows: "The Cleveland, Cincinnati, Chicago & St. Louis R. Co. Big Four route. Fourth of July Excursion, 1897. One continuous passage. (Return coupon). Muncie, Ind., to Lafayette, Ind., via short line only. Good only on trains scheduled to stop until July 6, 1897, inclusive. 3604. Form J. E. 8. E. O. McCormick, Pass. Traf. Mgr." The date of the sale of the coupon, July 3, 1897, was stamped on its back.

It was alleged that the train on which the appellee proposed to take passage did not leave Indianapolis until 12:30 A. M. July 7, 1897, and did not arrive at Lafayette until about 2:30 A. M. of that date. It was also alleged that during the sixth day of July, 1897, the appellant had five separate passenger trains running from Indianapolis to Lafayette, on regularly scheduled and publicly advertised time, stopping at the union passenger depot, in Indianapolis, to receive passengers, and stopping at appellant's depot in Lafayette to discharge passengers; that each of these trains ¹⁴⁰ furnished safe, convenient, and speedy accommodations for all passengers desiring to be carried thereon from Indianapolis to Lafayette; that there was plenty of room, convenience, and accommodation for the plaintiff upon any one of these trains, and the appellant was ready and willing safely, conveniently, and commodiously to carry him on the coupon from Indianapolis to Lafayette on any one of them, and would so have carried him on any one of them, on

the coupon, had he applied for passage thereon, which he did not do. It was further alleged that appellant had no right to deny the appellee passage on the train on which he traveled from Muncie, and the conductor on that train, in punching the coupon and permitting him to ride from Muncie to Indianapolis, only accepted the coupon for passage on that train, and not for passage on any other train of the appellant, and the conductor's agency in so doing was confined exclusively to that train; that all the appellant's passenger trains, on all its railroads, from the 3d to the 6th of July, 1897, inclusive, and long before and ever since, ran on regularly scheduled and duly and publicly advertised time, and the appellee, by proper inquiry of any of appellant's ticket agents at any of the stations on any of its railroads, could have readily informed himself of the arrival and departure of all the trains to and from any stations where the trains or any of them stopped for the reception or the discharge of passengers; that on the 6th of July, 1897, the appellant had on its railroad from Muncie to Indianapolis three passenger trains, which left Muncie and arrived at Indianapolis in time for the appellee to have taken the passenger train of the appellant and to have been carried thereon, on said coupon, to Lafayette on that day; that all said trains from Muncie to Indianapolis and from Indianapolis to Lafayette, on that day, were convenient, commodious, and speedy, such as were then used on first-class railroads in the United States, and the appellant was ready and willing, on that day, to carry the appellee, on the coupon, on any of said trains had he applied for passage thereon.

141 Essentially the same question arises under the complaint and the answer, which is whether or not the appellee was entitled to construe the return ticket as he did construe it. Though the gatekeeper and the conductor may have been entirely free from fault as between them and the appellant by reason of their obedience to the rules of the company, this will not suffice to relieve the appellant from liability if, as between it and the appellee, he was entitled upon the coupon to enter the train and to be carried to Lafayette. The railroad company itself prepared the ticket, or token, whereby it indicated the right of the appellee to transportation. It sold him two through tickets, one for a continuous passage from Lafayette to Muncie, and one for a continuous passage from Muncie to Lafayette. Going either way, it was necessary to change cars in the depot at Indianapolis, where it was proper

for passengers to tarry in the waiting-room between trains. For its own convenience and under its own regulations, the appellant used one ticket for both lines, for the one continuous passage. When the appellee during the life of the coupon, entered the car at Muncie and delivered up to the conductor the coupon, who accepted it from him as a passenger, it was a matter of the appellant's own convenience that the conductor, instead of keeping the coupon and procuring the appellee's admission to the connecting train, or of giving him another ticket or token of his right to be carried farther than the end of that conductor's run, punched the coupon and returned it to the passenger to be delivered by him to the next conductor. Of course, the passenger would be under obligation to conform to such reasonable regulations, but his right to passage would be determined by the language of the ticket which he delivered up to the conductor who punched it and returned it to him.

When, under the regulations of the railroad company, the passenger conforming thereto is placed in a situation needing explanation as between him and the conductor, it is the ¹⁴²duty of the passenger to give the needed explanations, and if he do so truthfully, it will be at the risk of the carrier if they be not accepted.

If, under the terms of the coupon, the appellee had the right, which he claimed, to a continuous passage from Muncie to Lafayette, as in going he had the right to a continuous passage from Lafayette to Muncie, his going into the waiting-room at the Indianapolis depot and his tarrying there outside the gates of the car-shed until the arrival of the next train to Lafayette did not make him cease to be the appellant's passenger, and as such he had the right at the proper time to return through the gateway for the purpose of taking his place in the car.

The case is not one involving the effect of explanations or directions given to the passenger when he bought his ticket, or oral or collateral agreement or understanding between him and the appellant's officers or agents; but is one where we must resort to the words of the printed ticket which he bought.

The purchaser of a railway ticket has a right to treat it according to its purport: *Brooke v. Grand Trunk R. R. Co.*, 15 Mich. 332. The complaint stated that the return coupon was marked, "Good until July 6, 1897, inclusive." In the copy of the coupon set out in the answer were the words, "One

continuous passage. (Return coupon.) Muncie, Ind., to Lafayette, Ind., via short line only. Good only on trains scheduled to stop until July 6, 1897, inclusive."

These words were the words of the railroad company, selected by it as the terms regulating the transportation which it sold to the appellee. If the language could be said to be so definitely precise that there could be no difference of opinion as to its meaning, no room for construction, the appellee would be bound accordingly, and the court would be obliged to follow that meaning; but if the language is ambiguous or admits of doubt as to its meaning, it must be given the construction of which it is capable most favorable ¹⁴³ to the passenger, and we must look with disfavor upon a construction which would work a forfeiture of a portion of the transportation purchased by him: Elliott on Railroads, sec. 1598; Evans v. St. Louis etc. R. R. Co., 11 Mo. App. 463; Auerbach v. New York etc. R. R. Co., 89 N. Y. 281, 42 Am. Rep. 291; Little Rock etc. R. R. Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584.

By its terms the coupon would not be good on trains not scheduled to stop, but if the holder sought to ride as a passenger on trains scheduled to stop, it would be good until July 6, 1897, inclusive. It was to be used for a continuous passage, which involved the necessary change at Indianapolis from one train to another, both being trains of one company, the one from which the ticket with its coupon was purchased.

The appellee commenced his return journey within the life of the ticket, and was seeking to make it a continuous journey. He did not present, and was not provided with, a separate ticket purporting to be good for passage only from Indianapolis to Lafayette good only until July 6, 1897; but he offered the gatekeeper and the conductor the ticket purporting to give the right of passage from Muncie to Lafayette, which, on leaving Muncie, he had presented to the conductor, who had punched it and returned it to the appellee to be delivered by him as the indication provided by the company of his right to be recognized as a passenger upon the connecting train. It cannot be said that the ticket showed clearly and without doubt his right to be received upon the connecting train after midnight. The company might easily have made the language of the ticket wholly free from doubt upon this question. Resolving all doubt in favor of the holder of the ticket, we cannot say that he, taking the language of the ticket into consideration with the circumstances, might not in good faith

construe the coupon as indicating a right to a continuous passage from Muncie to Lafayette on the appellant's connecting trains, if he presented ¹⁴⁴ the ticket and became a passenger at Muncie on the train upon which he in fact did take passage. The coupon which he presented at Indianapolis had been punched by the appellant's conductor, and itself indicated to the appellant that it had been presented and used during the limited time, between Muncie and Indianapolis. If it did not indicate the particular train on which it had been so used, this was because the regulations of the appellant were inadequate to that extent, and the truthful explanation of the appellee supplied that information.

The appellant, owning the two connecting railroads, treated them as one line upon its ticket and coupon, and it cannot be said that there was no warrant for the assumption on the part of the appellee that the continuous passage was an entirety, commenced by surrendering the coupon on the first part of the journey, though the coupon came again into his possession for the purpose for which, after punching it, the conductor delivered it to him.

In *Evans v. St. Louis etc. R. R. Co.*, 11 Mo. App. 463, the holder of a ticket which by its terms was to be used on or before the expiration of a specified day, entered upon the transit before midnight of the last day to which the ticket was limited. It was held that he complied with the terms of the limitation, and was entitled without further payment of fare to be carried to the end of the journey, though the transit could not be completed until after the expiration of the last day to which the ticket was limited.

In *Auerbach v. New York etc. R. R. Co.*, 89 N. Y. 281, 42 Am. Rep. 290, the plaintiff, on the 21st of September, 1877, purchased a ticket at St. Louis for New York over several railroads mentioned on coupons attached. By its terms the ticket was "good for one continuous passage to point named in coupon attached," and it was stated on the ticket that the selling company acted only as agent for the other roads and assumed no responsibility beyond its own line; that the holder agreed with the respective companies to use the ticket on or before the ¹⁴⁵ twenty-sixth day of September, 1877, and that if he failed to comply with the agreement, either of the companies might refuse to accept the ticket or any coupon thereon, and demand the full regular fare, which he agreed to pay. He left St. Louis September 21st, and rode to Cincinnati, where

he stopped a day. Then he rode to Cleveland, and having remained there a few hours, he rode to Buffalo, reaching that city September 24th, and remained there a day. He had then used all the coupons but one which entitled him to one first-class passage over the defendant's road from Buffalo to New York. He purchased a ticket over the defendant's road from Buffalo to Rochester, and upon this ticket rode to Rochester, where he arrived in the afternoon of the 25th of September. Remaining there one day, he entered a car on the defendant's road on the afternoon of September 26th, to complete his passage to New York. He presented the ticket, with the one coupon attached, to the conductor, who accepted it, and it was recognized as a proper ticket, and was punched several times, until the plaintiff reached Hudson about 3 or 4 o'clock A. M., September 27th, when the conductor in charge of the train declined to recognize the ticket on the ground that it had run out, and demanded fare to New York, which the passenger declined to pay, and the conductor ejected him. The trial court nonsuited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from an intermediate point. The general term affirmed the nonsuit, on the ground that, although the plaintiff commenced his passage upon the 26th of September, he could not continue it after that date on that ticket. The court of appeals held that the plaintiff was improperly nonsuited. It was said in the court's opinion that the plaintiff was bound to a continuous passage over the defendant's road; he was not, however, bound to commence it at Buffalo, but might commence it at any intermediate point between Buffalo and New York; also that when on the ¹⁴⁶ 26th of September, he entered the train at Rochester and presented the ticket, and it was accepted and punched, it was then used within the meaning of the contract; that it could then have been taken up; that so far as the plaintiff was concerned it had then performed its office; that it was thereafter left with him, not for his convenience, but under the regulations of the defendant for its convenience, that it might know that his passage had been paid for.

In *Gulf etc. R. R. Co. v. Looney*, 85 Tex. 158, 34 Am. St. Rep. 787, 19 S. W. 1039, a distinction was made between the case of a ticket over connecting railways, being a joint undertaking of the several carriers executed by one of the companies for itself and the others, for transportation within a limited

time, and the case of a coupon ticket over connecting lines, limited as to time, stipulating that the selling company acted as the agent of the connecting companies, and would not be responsible beyond its own line. It was held that, where the passenger, through the fault of one of the intervening lines, reached the beginning of the last line after the limited time had expired, he would be entitled upon such joint ticket to passage on the last line, but in the other case, wherein each coupon became the separate contract of the line for which it was issued, he would not be entitled to passage on the last line. The court, referring to the case presented by the plaintiff's petition, which was held sufficient on demurrer, said: "A joint undertaking having been shown by the petition of all the connecting lines to transport the plaintiff from Birmingham, Alabama, to Cameron, Texas, the limitation of the time in the ticket also applied to the time within which the journey should be commenced at Birmingham; and the plaintiff having commenced his journey within the time prescribed and continued the same, without a stop-over, to McGregor, he was entitled to be transported by defendant from McGregor to Cameron, notwithstanding the limitation to his ticket had expired when he reached McGregor: 2 Wood's Railway Law. 1397, ¹⁴⁷ 1398; Lundy v. Central Pac. Ry. Co., 66 Cal. 191, 56 Am. Rep. 100, 4 Pac. 1193."

In Gulf etc. R. R. Co. v. Henry, 84 Tex. 678, 19 S. W. 870, it is said in the course of the opinion: "The right of plaintiff was to travel by one continuous journey from Brenham to Balinger on such trains on appellant's road as carried passengers and made connection between those places, and this continuity would not be broken by any delay or change of cars made necessary by the conduct of appellant's business."

In Lundy v. Central Pac. R. R. Co., 66 Cal. 191, 56 Am. Rep. 100, 4 Pac. 1193, the Union Pacific Railroad Company sold to the plaintiff a single through ticket from Omaha to San Francisco, "not to be good for passage after nine days from date of sale, March 12, 1874." The plaintiff boarded a train of the Union Pacific Railroad Company on March 21st, and that company accepted the ticket and transported him to Ogden, where its line connects with that of the defendant, whose railroad extended from Ogden to San Francisco. The contract for carrying him from Omaha to San Francisco was made by the Union Pacific Railroad Company by authority of

the defendant. At Ogden, where he so arrived March 24, 1874, he on the same day went on board the connecting train of the defendant. When he presented his ticket he was told by the conductor that the time had expired, and upon his refusal to pay fare from Ogden to San Francisco, he was expelled. It was said by the court that "it was only required of the plaintiff that he present himself at the cars of the Union Pacific Railroad Company, or of the defendant, and take passage at any time within nine days from the twelfth day of March, 1874. The plaintiff took passage on the 21st of the same month, and was illegally ejected from the cars of defendant by its servant on the morning of the 25th following": See, also, *Georgia etc. R. R. Co. v. Bigelow*, 68 Ga. 219; *Ward v. New York etc. R. R. Co.*, 9 N. Y. Supp. 377, 56 Hun, 268.

The case of *Mitchell v. Southern Ry. Co.*, 77 Miss. 917, 27 148 South. 834, relied on by the appellant in argument, is distinguishable (as is clearly indicated in the court's opinion) from the case at bar and the cases above cited. We find no error in the rulings of the court below upon the pleadings.

On the trial it appeared in the testimony that at the Indianapolis depot the appellee walked into the passageway and presented the ticket. The gateman took it and looked at it, and said: "That ticket is no good." The appellee said: "How is that?" The gateman said: "It's run out, and that is all there is to it." The appellee could not remember what he said, but he made some objection. The gatekeeper said: "There is no use; get out of the way, and let other passengers through." This was at about 12:20 A. M. The appellee had arrived at 11:20 P. M. and this was the first train thereafter. The appellee stood aside and waited till the crowd got through. Other people made objection. The conductor came up and said: "That ticket I would not accept, if you got on the train." The gatekeeper did not let him through. There was a large crowd of people standing about, who heard what was going on between the appellee and the gateman and the conductor. He was not acquainted with any of the persons standing about, but afterward became acquainted with one of them. He was put to the expense of twenty cents for a place to lodge and eat. He traveled from Indianapolis to Lafayette on a freight train on the appellant's road, leaving the former place about 1 o'clock P. M., and arriving at his destination about 3 o'clock P. M. of the 7th, his passage costing him two cigars given by

him to a brakeman, the cigars having cost him ten cents. He rode about forty miles in a freight-car, when, upon the order of the conductor, the appellee and others who were in the car got out. He talked with the conductor, and under his direction he rode the remainder of the way on the bumpers between two freight-cars. When testifying in relation to what took place between him and the gateman and the conductor at the gateway, he was permitted, over objection, to testify ¹⁴⁹ that he felt ashamed. It is contended that this ruling was error, and that the damages are excessive.

The appellee is to be regarded as being a passenger at the time he was seeking to pass through the gateway when he was ordered out of the passageway. The ticket which he presented was good, and entitled him to be carried and to be treated with the courtesy due from the servants of a public carrier of passengers toward one whose rights as a passenger are unquestioned. We cannot see substantial distinction in the matter of damages between such a case and one involving the wrongful ejection of a passenger from a train. The humiliation suffered by the passenger as part of the effect of the wrong is in this state an element in the measure of damages. It should not be considered necessary, in order to entitle the passenger to recover for his humiliation, that he resent it and require the application of physical force to his person before yielding to the wrongful requirements of the carrier's servants. If the courts will not afford redress for such wrongs, the incentive to resist or to seek redress by the employment of force is increased. Where, as here, the amount of compensatory damages in such case cannot be said to be excessive through improper motives of the trier, it will be permitted to stand: *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Toledo etc. R. R. Co. v. McDonough*, 53 Ind. 289; *Cincinnati etc. R. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Indianapolis etc. Ry. Co. v. Howerton*, 127 Ind. 236, 26 N. E. 792; *Louisville etc. Ry. Co. v. Wolfe*, 128 Ind. 347, 25 Am. St. Rep. 436, 27 N. E. 606; *Chicago etc. R. R. Co. v. Graham*, 3 Ind. App. 28, 50 Am. St. Rep. 256, 29 N. E. 170; *Lake Erie etc. Ry. Co. v. Close*, 5 Ind. App. 444, 32 N. E. 588; *Chicago etc. R. R. Co. v. Conley*, 6 Ind. App. 9, 32 N. E. 96, 865; *Lake Erie etc. R. R. Co. v. Arnold*, 8 Ind. App. 297, 34 N. E. 742; *Pittsburgh etc. R. R. Co. v. Berryman*, 11 Ind. App. 640, 36 N. E. 728; *Baltimore etc. R. R. Co. v. Worman*, 12 Ind. App. 494, 40 N. E. 751; *Evansville etc. R. R. Co. v. Cates*, 14 Ind.

App. 172, 41 N. E. 712; Louisville etc. Ry. Co. v. Goben, 15 Ind. App. 123, 42 N. E. 1116, 43 N. E. 890.

Judgment affirmed.

Railway Ticket—Time Limit.—A railroad ticket conditioned not to be good for passage after nine days from the date of sale does not require the passage to be completed within that time: Lundy v. Central Pac. R. R. Co., 66 Cal. 191, 56 Am. Rep. 100, 4 Pac. 1193. As to whether this rule obtains in case the journey is over connecting railroads, see Gulf etc Ry. Co. v. Looney, 85 Tex. 158, 34 Am. St. Rep. 787, 19 S. W. 1039; Auerbach v. New York Cent. etc. R. R. Co., 89 N. Y. 281, 42 Am. Rep. 290; Little Rock etc. Ry. v. Dean, 43 Ark. 529, 51 Am. Rep. 584.

MARION TRUST COMPANY v. CRESCENT LOAN AND INVESTMENT COMPANY.

[27 Ind. App. 451, 61 N. E. 688.]

A BUILDING AND LOAN ASSOCIATION MAY BORROW MONEY and give its promissory note therefor. (p. 260.)

LOAN ASSOCIATION—NOTE FOR UNAUTHORIZED PURPOSE.—A note given by a building and loan association for borrowed money may be enforced, though the association was insolvent, and the money was used in paying withdrawing stockholders, who were not entitled to receive the whole of it, and the lender had knowledge of these facts. (pp. 257, 263.)

J. W. Noel and F. J. Lahr, for the appellant.

W. E. Hackedorn and G. C. Calvert, for the appellee.

⁴⁵¹ COMSTOCK, J. The appellant, the Marion Trust Company, is receiver of the Washington Savings and Loan Association, an insolvent building and loan association, and is engaged in winding up its affairs. The appellee, another building and loan association, filed its intervening petition seeking to recover on two promissory notes given by the officers of the Washington Savings and Loan Association to appellee, payment of which was refused by the receiver.

⁴⁵² The petition of appellee was in two paragraphs, in the first of which the petitioner seeks to recover upon a note of one thousand dollars, with interest and attorneys' fees, payable to appellee, signed "The Washington Savings & Loan Assn., George C. Calvert, President. John W. Hall, Secretary." In the second paragraph the petitioner seeks to recover upon a note for two hundred dollars, with interest and attor-

neys' fees, payable to the appellee, signed "Washington Savings and Loan Assn., by H. F. Hackedorn, Vice-President," and attested by "F. M. Warner, Secretary." The petitioners alleged further that said notes are not paid, that payment is refused by the receiver, and pray the court to have their claims allowed, with interest and attorneys' fees, as preferred claims against the assets of the Washington Savings and Loan Association in the hands of the receiver. The receiver, the appellant, demurred to the petition of appellee on the ground that said petition did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and exceptions taken.

The appellant answered the petition in three paragraphs, in each of which paragraphs there were general allegations setting out that the Washington Savings and Loan Association was a building and loan association, and that the Marion Trust Company was the duly qualified and acting receiver of said association, and that the Crescent Loan and Investment Company was a building and loan association, the first paragraph proceeding as follows: "That said note alleged and set out in the first paragraph of said petition was executed by George C. Calvert and John W. Hall, in the name of the Washington Savings and Loan Association; that said note was wrongfully and illegally and fraudulently executed to secure money to pay withdrawals in full to certain stockholders; that at said time George C. Calvert was president of said Washington Savings and Loan Association, and John W. Hall was secretary thereof; that said John W. Hall was also at the same time secretary of the ⁴⁵³ Crescent Loan and Investment Company, and that the said John W. Hall, acting for said Washington Savings and Loan Association, borrowed one thousand dollars of the same John W. Hall acting for the Crescent Loan and Investment Company; that on said date the Washington Savings and Loan Association was largely insolvent, its insolvency amounting to nearly fifty per cent, and that at said time there was not sufficient money in the treasury to pay certain shareholders who were demanding their withdrawals; that on said date one Samuel W. Miles was demanding the withdrawal of certificate No. 635, whose face value was six hundred and thirteen dollars, and one A. T. Stewart and Rhoda Stewart were demanding withdrawals on stock, the face value of which was five hundred and two dollars and sixty-seven cents; that at said time Samuel W. Miles had not been a member of said Washington Savings and Loan Association for sufficient length of time, as required by the by-laws, to have elapsed in order to

mature his withdrawal, and said Samuel W. Miles had not given notice of withdrawal as provided by the by-laws; that said A. T. Stewart and Mrs. Rhoda Stewart had, after filing their notice of withdrawal, regularly accepted dividends from time to time thereafter, and had not refiled their notice to withdraw after accepting said dividends, and that there were many stockholders who had filed their notice of withdrawal prior to the notice of withdrawal of said A. T. Stewart and Mrs. Rhoda Stewart, and who had not been paid the withdrawal value of their stock, and who were demanding the same. And the said money was so paid to the said Samuel W. Miles and to A. T. Stewart and Rhoda Stewart out of turn. That said stock was paid in full in the face value thereof, and was not discounted on account of the insolvency of the association, and that all of said one thousand dollars was borrowed of said Crescent Loan and Investment Company for the purpose of paying said withdrawals of said Miles and said A. T. Stewart and Rhoda Stewart; that at the time said money was borrowed in order to pay said withdrawals there was not sufficient money in ⁴⁵⁴ the treasury to pay said withdrawals, and that there was no money available at any future time for the payment thereof, and that the officers of said association who executed said note and the officers of the Crescent Loan and Investment Company who made said loan and accepted said note, all knew of the condition of said Washington Savings and Loan Association, and knew that said withdrawals were to be paid and were paid with said money so loaned, and were paid out of turn, and knew the facts and circumstances herein alleged; that said money was borrowed wrongfully, fraudulently, and illegally for the purpose of realizing money with which to permit certain shareholders to withdraw from said association without loss, whereas on distribution of the assets said shareholders will suffer great loss in the depreciation of their stock. That said loan and the execution of said note were not authorized by the board of directors of said Washington Savings and Loan Association, and the officers of said association made said loan and executed said note without authority."

The second paragraph is similar to the first paragraph, but alleges that Hackedorn was an officer of both associations at the time the loan was made, and stood in the same relation to both associations and to the two hundred dollar loan that Hall held to the associations and to the first loan of one thousand dollars, and that the loan was made for a similar purpose.

In the third paragraph of answer, which was in answer to appellee's first paragraph, the allegations were similar to the allegations in the first paragraph of answer, the only difference being in the purpose for which the money was loaned, in the third paragraph it being set out that the money was borrowed to take up a void note held by George C. Calvert, said Calvert having advanced money to the association to pay the withdrawal of one Miles, when Miles was not entitled to the withdrawal of his stock, for the reason that the association was insolvent, and Miles had given no notice.

The petitioner demurred separately to each paragraph of 455 answer, and the demurrers were sustained. The appellant refused to plead further. Whereupon the court gave judgment against the receiver for the sum of thirteen hundred and eighty-six dollars and sixty-six cents and one hundred and six dollars and two cents attorneys' fees, and costs, which judgment was made a preferred claim against the assets of the association. The specification of the assignment of errors discussed challenge the action of the court in sustaining the demurrers to appellant's first, second, and third paragraphs of answer.

A building and loan association may borrow money and give its promissory note therefor: *North Hudson etc. Assn. v. First Nat. Bank*, 79 Wis. 31, 47 N. W. 300, and authorities cited; *Beach on Private Corporations*, sec. 327.

For the consideration of this case, it may be conceded, as claimed by counsel for appellant, that this power to borrow is limited, viz., for emergency purposes when funds are in sight and soon to be available; that the payment of money secured upon the credit of the association to stockholders in full when the association is insolvent is a fraud against the remaining stockholders; that the corporation is charged with knowledge of the acts of its officers who loan money to another corporation, of which he is also an officer when he transacts the business for both corporations; that in seeking to recover upon the notes in suit, the appellee ratifies the agency of the officer who acted for it in the transaction, and accepts his knowledge as its own; that members have no right to withdraw from an insolvent corporation and have no equitable right to more than their pro rata share of the assets: *Bingham v. Marion Trust Co.*, 27 Ind. App. 247, 61 N. E. 29.

If an officer borrows money without authority and gives the note of the corporation therefor, the board of directors may

subsequently ratify his act and give to it the force of a contract entered into by the express authority of the board of directors: Beach on Private Corporations, sec. 195; Morawetz on Private Corporations, sec. 634. "The maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other ⁴⁵⁶ principal, and it is equally to be presumed from the absence of dissent": Kelsey v. National Bank, 69 Pa. St. 426, 429. Unless a principal disaffirm promptly the act of his agent by which he has transcended his authority, he makes the act his own. In accepting the proceeds of the loan made by the agent without authority, the principal ratifies the act of the agent: Mechem on Agency, sec. 148.

The Washington Savings and Loan Association borrowed money and applied it to a purpose which, under the law, was not authorized, and applied to the payment of stockholders who were not entitled to receive the whole of it. The act was not actually prohibited by express law, nor against public policy, but it was in excess of the power of the corporation; yet the association received the benefit of the money thus borrowed, though not to the full extent of the amount borrowed, and still retains it without any offer of a return thereof.

The general principles of the law of ultra vires are in 4 American and English Encyclopedia of Law, second edition, page 1018, thus stated: "The general principles of the law of ultra vires apply to the contracts of building and loan associations, and, subject to the various modifications elsewhere laid down, it may be said that if the contract in question is not prohibited by express law, nor contrary to public policy, but merely in excess of the powers granted to the corporation, it is enforceable if executed on both sides, or on the side of either the corporation or the other party; but if wholly executory, it is not enforceable. If contrary to public policy or prohibited by a statute forbidding the contract in question, the contract, save in certain excepted cases, cannot be enforced": See, also, Endlich on Building Associations, sec. 218; Thompson on Building Associations, 107.

In Wright v. Hughes, 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907, an action by policy holders of an insurance company to have canceled and declared void a mortgage executed by the directors to another insurance company, the court say at page ⁴⁵⁷ 331 (119 Ind., 12 Am. St. Rep. 418, 21 N. E. 909): "If, however, it were conceded that the borrowing of the money

was a transaction beyond the chartered power of the corporation, the authorities fully justify the conclusion that it would not be heard to assert the invalidity of the transaction while it retained its fruits. The rule is now too thoroughly established to be longer open to question, that where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation: *State Board v. Citizens' St. Ry. Co.*, 47 Ind. 407, 17 Am. Rep. 702; *Louisville etc. Ry. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; *Chicago etc. Ry. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239; *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172; *Hitchcock v. Galveston*, 96 U. S. 341; *Ohio etc. Ry. Co. v. McCarthy*, 96 U. S. 258; *Bradley v. Ballard*, 55 Ill. 413, 7 Am. Rep. 656; *Memphis etc. R. R. Co. v. Dow*, 19 Fed. 388; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504."

It is earnestly insisted by counsel for appellant that, if the lender, "an association", by its officer, acts conjointly with the officer of another association to make a loan to the second association, for illegal purposes working fraud against it, the same individual being the officer acting for each and both associations, the lender cannot recover." The facts as averred in the answer show that the officer of the Crescent Loan and Investment Company knew that the money was being borrowed and applied to a purpose unauthorized, but not actually prohibited. It has been held that the lender of money is not affected by the wrongful application of the money loaned, and that his right to recover will not be defeated by his knowledge that it was to be devoted to an illegal use, unless such illegal use was made a condition of the lending, or the lender actually participated in such illegal use. The cases recognize the distinction between knowledge of the lender of the illegal purpose of the borrower and the doing ⁴⁵⁸ of an act to further that intent. The contract of loan was not in itself illegal or immoral.

Appellee had money to loan; the Washington Savings and Loan Company was authorized to borrow it for legitimate purposes. Appellee knew that the money was borrowed for a purpose not in itself immoral or wrong, but illegal because not within its corporate power. The validity of a contract depends upon its terms, and the consideration upon which it is executed. The contract of appellee was to loan the money,

and of the appellant to pay it back. Such contract is a legal one. The mere knowledge of appellee of the illegal use to which it was intended to apply the money, or the purposes of the appellant, do not form a part of the consideration. The consideration is the cause of the contract, and is distinct from the motive to it.

In *Tracy v. Talmage*, 14 N. Y. 162, 210, 67 Am. Dec. 132, the doctrine is laid down that in an action to recover the price of goods sold, it is no defense that the vendor knew they were bought for an illegal purpose, provided it was not made a part of the contract that they should be used for that purpose, and provided, also, that the vendor had done nothing in aid or furtherance of the unlawful design beyond the mere sale with knowledge of the intent of the purchaser. Contracts founded upon an illegal consideration, or which contemplate the performance of that which is either *malum in se* or prohibited by positive statute, are void. This rule does not apply to contracts made by corporations which are objected to as merely *ultra vires*.

In *Wright v. Hughes*, 119 Ind. 324, 12 Am. St. Rep. 417, 21 N. E. 909, the court at page 330 (119 Ind., 12 Am. St. Rep. 417, 21 N. E. 909), of the opinion say: "In such a case, although the lender may know that it is the purpose of the borrower to use the money in an irregular way, yet if the contract between the lender and borrower is not in violation of law, or declared void by statute, the money may be recovered, unless the lender was in some way implicated in furthering the borrower's design, or accessory to the prohibited or illegal act: ⁴⁵⁹ *Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 18 N. E. 687; *Cummings v. Henry*, 10 Ind. 109; *Bickel v. Sheets*, 24 Ind. 1." This case is cited and approved in *First Nat. Bank v. Dovetail etc. Co.*, 143 Ind. 550, 52 Am. St. Rep. 435, 40 N. E. 810.

The contract has been fully performed on the part of appellee. The Washington Savings and Loan Association has received the fruits of the contract. It would be inequitable to allow the representative of the corporation to set it aside and retain its benefits; such holding would be a more serious violation of law and morals than the unauthorized loan and misappropriation of the money borrowed. There is no question that a part of the money paid to the stockholders was owing them; all the other shareholders were thereby benefited by such payment. The parties to whom it was paid were ad-

mittedly entitled to a portion of it. If it was used in the payment of claims before they were due, or in amounts larger than were due, and in payment of apparent and not actual liabilities, such facts would not justify the repudiation of the debt.

Judgment affirmed.

Loan Association—Notes by.—That a building and loan association may borrow money and execute its note therefor, see the monographic note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 158.

Ultra Vires Transactions.—The doctrine of ultra vires, as applied to the contracts of private corporations, is discussed at length in the monographic note to *In re Assignment Mutual etc. Ins. Co.*, 70 Am. St. Rep. 156-180.

McFARLANE v. FOLEY.

[27 Ind. App. 484, 60 N. E. 357.]

FIXTURES.—THERE IS NO GENERAL TEST FOR DETERMINING whether a chattel acquires the nature of realty by being affixed thereto. In each case regard must be had to the chattel itself, the injury that would result from its removal, and the intention in placing it upon the premises with reference to use or ornament. (p. 265.)

FIXTURES—INTENTION.—WHETHER AN ARTICLE annexed to the freehold becomes a part thereof is primarily a question of intention. And such intention is to be inferred from the nature of the article, the relation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation is made. (p. 266.)

FIXTURES — MECHANIC'S LIEN. —CHANDELIERS attached to a building become a part of the realty, when such is the intention of the owner of the building, and a contractor who furnishes and puts them in may enforce a mechanic's lien therefor. (pp. 266, 267.)

D. A. Myers, for the appellants.

C. T. Hanna and T. A. Daily, for the appellees.

⁴⁸⁴ **WILEY, J.** This was an action by appellees against appellants to foreclose a mechanic's lien. The facts upon which the action was based are in substance the following: One Waters was the owner of certain real estate in the city of Indianapolis, and he entered into a contract with certain parties to erect upon such real estate a building to be used as a dwell-

ing-house. Before such building was constructed, and before it was commenced, there was a mortgage on the real estate for a balance of the unpaid purchase price, and Waters also executed another mortgage in favor of the appellant McFarlane for borrowed money with which to erect ⁴⁸⁵ the building. By an agreement between appellant McFarlane and the original mortgagee, the latter agreed that the McFarlane mortgage should be a prior lien upon the real estate. Waters contracted with the appellees to fit the dwelling-house with chandeliers for lighting purposes at an agreed price. Appellees furnished the chandeliers and the labor for placing them in position ready for use, and after furnishing such chandeliers, and placing them in the dwelling ready for use, they filed a notice of their intention to hold a mechanic's lien against the property to secure their debt. This was done within the statutory time. The case was put at issue, tried by the court, and upon proper request the court made a special finding of facts and stated its conclusions of law thereon. Appellants excepted to the conclusions of law.

The appeal is prosecuted by the appellant McFarlane alone, and the errors assigned by her are: 1. That the court erred in overruling her demurrer to the complaint; and 2. The court erred in overruling the motion for a new trial. These two assigned errors may very properly be considered together, for, as disclosed by the argument of appellant's counsel, they involve substantially the same question, and that question is whether or not chandeliers furnished as the chandeliers for this building were, and placed in the building for the purpose of lighting it, become a part of the realty and subject to a mechanic's lien. It is very earnestly insisted by appellant that chandeliers, after being attached to realty, as in this case, are mere articles of furniture, and retain their character as personalty. We are inclined to the view that in the light and tendency of modern decisions the question is one of easy solution. It may be remarked, however, that the earlier decisions, both in this country and in England, tended strongly to the view that property of this character, although attached to the building, as chandeliers are attached, was to be considered as personalty, but the great weight of modern authorities hold that they become a ⁴⁸⁶ part of the realty. As to what is or is not an immovable fixture is a question of both law and fact, and in the light of the authorities in this state upon the propo-

sition, there is no longer any doubt what constitutes an immovable fixture.

In the case of *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, the question is presented and decided with much clearness. Judge Mitchell, speaking for the court, said: "The united application of three requisites is regarded as the true criterion of an immovable fixture: 1. Real or constructive annexation of the article in question to the freehold; 2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; 3. The intention of the party making the annexation to make the article a permanent accession to the freehold": Citing *Teaff v. Hewitt*, 1 Ohio St. 511, 530, 59 Am. Dec. 634; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Ewell on Fixtures*, 21; *Tyler on Fixtures*, 114; *McRea v. Central Nat. Bank*, 66 N. Y. 489. See, also, *Parker Land etc. Co. v. Reddick*, 18 Ind. App. 616, 47 N. E. 848.

There is no general rule or test for determining whether or not an article personal in nature has acquired the character of realty by being attached thereto. In each particular case regard is to be had to the chattel itself, the injury that would result from its removal, and the intention in placing it upon the premises with reference to use or ornament: See *Parker Land etc. Co. v. Reddick*, 18 Ind. App. 616, 47 N. E. 848; *Pea v. Pea*, 35 Ind. 387; *Pickerell v. Carson*, 8 Iowa, 544; *Coburn v. Litchfield*, 132 Mass. 449; *Thomas v. Davis*, 76 Mo. 72, 43 Am. Rep. 756; *Strickland v. Parker*, 54 Me. 263.

In *Dutton v. Ensley*, 21 Ind. App. 46, 69 Am. St. Rep. 340, 51 N. E. 380, this court said: "The modern authorities no longer adhere to the doctrine that physical annexation is the proper criterion by which to determine whether a fixture is real or personal property": *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. 809; *Meig's Appeal*, 62 Pa. St. 28, 1 Am. Rep. 372.

⁴⁸⁷ As we have seen, the intention of the party making the annexation has much to do with determining whether or not an article personal in its character becomes a part of the freehold by attachment or otherwise. As to what such intention was in making the annexation is inferred from the following facts: 1. The nature of the article annexed; 2. The relation of the party making the annexation; 3. The structure and mode of annexation; 4. The purpose or use for which the annexation has been made: *Tillman v. De Lacy*, 80 Ala. 103; *Capen v. Peckham*, 35 Conn. 88; *Pea v. Pea*, 35 Ind. 387;

Eaves v. Estes, 10 Kan. 314; *Dudley v. Hurst*, 67 Md. 44, 10 Am. St. Rep. 368, 8 Atl. 901; *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 299; *McRae v. Central Nat. Bank*, 66 N. Y. 489; *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Hutchins v. Master-son*, 46 Tex. 551, 26 Am. Rep. 286; *Hill v. Wentworth*, 28 Vt. 428; *Green v. Phillips*, 26 Gratt. 752, 21 Am. Rep. 323; *Taylor v. Collins*, 51 Wis. 123, 8 N. W. 22.

In the more modern cases it is quite generally held that whether or not an article or structure is a part of the realty is primarily a question of the intention with which it was connected or put in position, it being a part of the realty, if such was the intention: *Tillman v. De Lacy*, 80 Ala. 103; *Hendy v. Dinkerhoff*, 57 Cal. 3, 40 Am. Rep. 107; *Capen v. Peckham*, 35 Conn. 94; *Watertown Steam Engine Co. v. Davis*, 5 Houst. 192; *Dooley v. Crist*, 25 Ill. 453; *Hewitt v. General Electric Co.*, 61 Ill. App. 168; *Kaestner v. Day*, 65 Ill. App. 623; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753; *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 21 Am. St. Rep. 231, 25 N. E. 558; *Dutton v. Ensley*, 21 Ind. App. 46, 69 Am. St. Rep. 340, 51 N. E. 380; *Rowland v. West*, 62 Hun, 583, 17 N. Y. Supp. 330; *Christian v. Dripps*, 28 Pa. St. 271; *Lipsky v. Borgmann*, 52 Wis. 256, 38 Am. Rep. 735, 9 N. W. 158.

That the chandeliers in question in this case became a part of the realty is, in our judgment, settled by the special findings, wherein it is stated that it was the purpose and ⁴⁸⁸ intention of Waters that said "chandeliers and bracket lights should be and become a permanent part and parcel of said real estate." In none of the authorities relied upon by appellant was the question of intention involved, and therefore they are not applicable to the facts in this case. That chandeliers for lighting purposes are adapted to the use and enjoyment of dwelling-houses in these modern days is too clear a proposition to admit of argument or discussion, and as intention is of controlling influence, we are clear that in this case the chandeliers became a part of the realty and thereby lost their character as personal property. It follows from this that they are subject to a lien under the provisions of the statute, and therefore the court reached a correct conclusion. Some questions are raised and discussed as to the admission of certain evidence over the objection of appellant, but there was no error in the rulings of the court thereon. Some objection is urged to the sufficiency of the complaint on other grounds than those sug-

gested, but in our judgment such objections are not well taken, and we are clearly of the opinion that the complaint states a good cause of action. Upon a consideration of the whole record, we are strongly impressed with the view that the trial court reached a correct conclusion, and the record, as it comes to us, does not present any reversible error.

Judgment affirmed.

To Constitute a Fixture, there must be actual annexation to the realty or something appurtenant thereto, application to the use for which that part of the realty with which it is connected is appropriated, and the intention of the party making the annexation to make a permanent accession to the freehold: *Thompson v. Smith*, 111 Iowa, 718, 82 Am. St. Rep. 541, 83 N. W. 789. The intention of the parties is a controlling consideration: *Edwards etc. Co. v. Rank*, 57 Neb. 323, 73 Am. St. Rep. 514, 77 N. W. 765; *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 84 Am. St. Rep. 867, 85 N. W. 698. The authorities are conflicting as to whether gas and electric-light fixtures retain their quality of personal property when put into place in buildings: See *Canning v. Owen*, 22 R. I. 624, 84 Am. St. Rep. 858, 48 Atl. 1033; *Hall v. Law Guarantee etc. Co.*, 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643; *Capelhart v. Foster*, 61 Minn. 132, 52 Am. St. Rep. 582, 63 N. W. 257; monographic note to *Gray v. Holdship*, 17 Am. Dec. 691, 692. Agreements by which fixtures are to retain their character as personalty are considered in the monographic note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 877-901.

MAXWELL v. SHIRTS.

[27 Ind. App. 529, 61 N. E. 754.]

WATERS—WRONGFUL DIVERSION.—A COMPLAINT for damages and an injunction averring that upon the defendant's land two ravines unite, from the banks of which and into which water flows from springs throughout the year, having its outlet in a pond on the defendant's land, and flowing upon the plaintiff's only in time of overflow, but that the defendant has constructed a dam, causing the water to flow on the plaintiff's land, rendering it unfit for cultivation, and is threatening to continue the same, states a cause of action. (p. 269.)

A WATERCOURSE IS A STREAM OF WATER ordinarily flowing in a certain direction, through a defined channel, with bed and banks. The size of the stream is not material. (p. 269.)

WATERS—WRONGFUL DIVERSION—EVIDENCE.—In an action for diverting waters from their natural course and onto the land of another, it is not error to permit a witness, acquainted with the location, to testify as to his observations of the course of the water a number of years before. (p. 271.)

WATERS—WRONGFUL DIVERSION—EVIDENCE.—In an action for diverting waters from their natural course and onto the land of another, the testimony as to the construction of a ditch

some years previous near the stream is admissible as tending to show the condition of the lands around the watercourse. (p. 271.)

WATERS—WRONGFUL DIVERSION BY TENANT.—If it appears, in an action for diverting waters from their natural course, that the diversion is due to the acts of a tenant in possession, it is error to render judgment against the land owner. (pp. 271, 273.)

W. V. Rooker, for the appellants.

George Shirts, W. R. Fertig, L. S. Baldwin, and A. F. Shirts, for the appellees.

530 **ROBINSON, J.** Action by appellees for damages and injunction. Complaint in two paragraphs, demurrers to which were overruled. Trial by court with special finding of facts and conclusions of law. Appellants' joint and several motions for new trial overruled, and judgment and decree in appellees' favor. Errors assigned question the rulings on the demurrers and the motions for a new trial, also the correctness of the conclusions of law.

The complaint avers in substance that appellees and appellant Rooker own lands adjoining; that upon appellant's land are two ravines, from the banks of which and into which water flows from springs throughout the year; that these ravines come together upon appellant's land, and that the natural outlet for the water is in a depression or pond on appellant's land, and that none of the water from this branch flows naturally upon appellees' land except in time of overflow; that appellants have, without right, wrongfully constructed a dam on appellant Rooker's land across this branch, whereby the water is prevented from following its natural course and running on appellant's land, but causing the water to leave its natural course and run onto appellees' land, rendering the same unfit for cultivation; that appellants are threatening to continue the dam and to turn the water from its natural course upon appellees' land, also averring damages.

The complaint states sufficient facts to constitute a cause of action. It proceeds upon the theory that appellants have wrongfully diverted a natural watercourse from their own **531** land upon the land of appellees, to their damage. The complaint designates the stream of water as a watercourse, which has been defined by the courts to be a stream of water ordinarily flowing in a certain direction, through a defined channel, with bed and banks: *Weis v. City of Madison*, 75 Ind. 241, 39 Am. Rep. 135. Whether the stream here in question will come within this definition is a matter of proof. If the

wrongful diversion of a natural watercourse has produced injury, there is a liability. It has been held that the size of the stream is not material, and that if the water has a definite course "as a spring or springs, and takes a definite channel, it is a watercourse, and no person through whose land it flows has any right to divert it from its natural channel so as to injure another land owner": *Mitchell v. Bain*, 142 Ind. 604, 42 N. E. 230; *Gillett v. Johnson*, 30 Conn. 392; *Case v. Hoffman*, 84 Wis. 438, 36 Am. St. Rep. 937, 54 N. W. 793, *Pyle v. Richards*, 17 Neb. 180, 22 N. W. 370; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *Hebron etc. Co. v. Harvey*, 90 Ind. 192, 46 Am. Rep. 199; *Drake v. Schoenstedt*, 149 Ind. 90, 48 N. E. 629.

The facts found are that appellees own certain described lands, and east and north thereof and adjoining are the lands of appellant Rooker. A little west of south from the northeast corner of appellees' land is a pond or basin covering from three to five acres, and west of north of the same corner is a like basin or pond on appellant's land from two to five acres in extent. These ponds are about fifteen rods apart and have no natural channel or connection between them, there being a ridge about two and one-half feet high separating them. In 1893 appellees drained the pond on their land, which ditch was and is sufficient to carry away all the water that naturally collects in the pond, and after such drainage, until 1897, the land was cultivated. That north of east from the northeast corner of appellees' land and upon appellant's land are two ravines, along which are springs which flow therein, which ravines unite on appellant's land and form ⁵³² one stream which flows in a westerly direction over appellant's land and into the Rooker pond; that this branch flowed continuously throughout the year in a well-defined channel, and emptied into the pond in which there was water throughout the year; that no water from this spring branch has at any time naturally flowed upon and over appellees' land, and that no water from the Rooker pond has flowed onto appellees' land except in time of overflow from White river. Facts are also found to show that on different occasions, beginning in 1883, the then owner of the Rooker land undertook to divert the channel of this branch by means of ditches and dams, so that the water would flow into the pond on the land now owned by appellees, but that such changes were made without the knowledge or consent of the persons then owning the land now owned by appellees,

and that such owners would cut the dams and fill the ditches so as to turn the water into the original channel that ran into the Rooker pond, and two different times the water broke through the embankment that had been made to prevent the water flowing into the Rooker pond, and made new channels, and the water flowed through these channels into the Rooker pond, and continued to flow through the last channel so made until about ninety days before the bringing of this action, when appellants, without the knowledge or consent of appellees, placed a dam across the well-defined channel and made an excavation which carried the waters onto the land of appellees; that on the seventh day of May appellees removed the dam and filled the excavation, which were afterward, on the same day, rebuilt by appellants and again removed by appellees, and notice given to the servants of appellant not to change again the course of the water, but no heed was given this notice, and the dam was again rebuilt, and has since remained, diverting the waters of the branch upon appellees' land and into the basin, rendering the land therein worthless, and injuring about five acres of land adjoining, to appellees' damage in the sum of twenty-five dollars; that appellant ⁵³³ Maxwell is the tenant of appellant Rooker, and in possession of the Rooker lands, and was such at the time of the construction of the dam across the channel last described.

As conclusions of law, the court stated that appellants, their agents and servants, ought to be perpetually enjoined from diverting the water referred to from its natural course and thereby running the same on appellees' land; that they ought to remove any obstruction which they have constructed which diverts the water from its natural course onto appellees' lands, and that appellees ought to recover twenty-five dollars as damages.

One of the questions to be determined was the course and terminus of the watercourse in question, and it was not error to permit a witness acquainted with the location to testify as to his observations of the course of the water a number of years before that. Appellants have not shown how they could be harmed by such evidence.

Objection is made to the testimony of a witness as to the construction of a ditch, some years previous, between the Shirts pond and the Rooker pond. It is true the parties to this action could not be bound by any acts of the witness, but the testimony was proper as tending to show the condition of

the lands around the watercourse in question. Such testimony would not necessarily tend to show a license to flow the water in a particular direction.

Objection is made to the introduction of certain other testimony, but as it is not made to appear how appellants were or could have been harmed by its introduction, we do not think it necessary to notice it more fully.

There is evidence to support the findings of the court that the natural outlet of the water was upon appellant Rooker's land, and that the course had been diverted so that the water is thrown upon appellees' land. The findings of the court as to appellant Maxwell are supported by the evidence, and as to him the conclusions of law are right.

Appellant Rooker separately moved for a new trial, separately ⁵³⁴ assigns error, and argues that his motion for a new trial should have been sustained because the finding is not sustained by sufficient evidence. Appellants were sued for damages resulting from the diversion of a watercourse, and an injunction asked to prevent them from constructing or maintaining certain dams and excavations which would change the water from its natural course and throw it upon appellees' land. The acts complained of result in a nuisance. The evidence and findings show that Rooker owned the land, and that appellant Maxwell is his tenant, and is and was in possession of the land at the time of the acts mentioned. These acts were done by him after he became the tenant in possession of the land. There is nothing showing the nature of this tenancy, whether the landlord was to keep the premises in repair, and, therefore, the acts done by the tenant were done by him acting as the landlord's servant. There is no evidence in the record that appellant Rooker had anything whatever to do with constructing or maintaining the dams or excavations. It is not shown that these acts, or any of them, were done at the instigation or with the knowledge or consent of Rooker. So far as the record shows, his first knowledge of the controversy here in question was when he was summoned as a defendant in this action. Aside from the fact that he owns the land, there is nothing connecting him with the matter: See *Jansen v. Varmun*, 89 Ill. 100.

In *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997, the owner of the property had rented it to the tenant to be used for the purpose of which complaint was made, received certain rent for that purpose, which was more than the property would rent

for for any other use. The general principle of law is declared in that case that the landlord is liable when he rents his premises for the purpose of the establishment thereon of a nuisance.

In *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, cited by counsel for appellees: "The landlord rented the nuisance and took rent for it. The tenants used it and paid rent, ⁵³⁵ and hence they must all be considered as continuing and responsible for the nuisance."

In the case at bar, the relief that could be granted was the relief to which the parties were entitled when they brought their action. The record fails to show that appellant Rooker was at fault at that time. The one fact that he is the owner of the land is not sufficient to support a judgment and decree against him. The nuisance was created by the tenant after the beginning of the tenancy, and it is not shown that Rooker had anything to do with its creation or maintenance, or that he in fact knew of its existence until suit was brought: 1 *Thompson on Negligence*, 1154 et seq.; 2 *Shearman and Redfield on Negligence*, 5th ed., sec. 708; *Wharton on Negligence*, 2d ed., sec. 817; *Union Brass etc. Co. v. Lindsay*, 10 Ill. App. 583; *Shindelbeck v. Moon*, 32 Ohio St. 264, 30 Am. Rep. 584; *Wood on Landlord and Tenant*, 2d ed., sec. 381; *Deller v. Hofferberth*, 127 Ind. 414, 26 N. E. 889.

The judgment as to appellant Maxwell is affirmed. As to appellant Rooker, the judgment is reversed, with instructions to sustain his motion for a new trial.

A Watercourse Consists of Water flowing in a certain direction by a regular channel, having a well-defined and substantial existence, but the water need not flow continually: *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 53 Am. St. Rep. 262, 20 South. 780; *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7; *Chamberlain v. Hemingway*, 63 Conn. 1, 38 Am. St. Rep. 330, 27 Atl. 239; *Hawley v. Sheldon*, 64 Vt. 491, 33 Am. St. Rep. 941, 24 Atl. 717; *Case v. Hoffman*, 84 Wis. 438, 36 Am. St. Rep. 937, 54 N. W. 793.

Overflowing Land.—An injunction is a proper remedy where the defendant has unlawfully caused the plaintiff's land to be overflowed and thereby damaged, and threatens and intends to continue so to do: *Carlson v. St. Louis River etc. Co.*, 73 Minn. 128, 72 Am. St. Rep. 610, 75 N. W. 1014. During the time that a tenant is in exclusive possession of premises, the landlord is not liable for the act of the former in obstructing the natural flow of surface water to the injury of an upper proprietor: *Baker v. Allen*, 66 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511.

ROGERS v. SHEWMAKER.

[27 Ind. App. 631, 60 N. E. 462.]

MARRIED WOMEN—ENTIRETIES—TRUST DEED.—An instrument, executed by a husband and wife, conveying an estate held by them by entireties to a third person to dispose of and apply the proceeds on the liabilities of the husband, is an absolute deed of trust, and not, on her part, a contract of suretyship. (pp. 274, 276.)

SURETYSHIP.—A MARRIED WOMAN is not liable, in Indiana, on her contract of suretyship. (p. 275.)

MARRIED WOMEN—ENTIRETIES—DISPOSAL OF PROCEEDS.—A married woman may, her husband joining in the conveyance, convey an estate held with him by entireties, and, with his consent, apply the proceeds to his debts or to any other purpose. (p. 277.)

MARRIED WOMEN—TRUST DEED, SETTING ASIDE.—If a husband and wife convey by a trust deed an estate held by them by entireties, the trustee to sell the property and apply the proceeds on the liabilities of the husband, and the trust is executed, a suit to recover the property, after years of acquiescence, cannot be maintained, even if the deed is considered in the nature of a mortgage. (pp. 277, 278.)

R. B. Stimson, H. A. Condit, and W. W. Rumsey, for the appellants.

J. E. Lamb, J. T. Beasley, and B. V. Marshall, for the appellees.

632 COMSTOCK, J. The complaint in this cause is in two paragraphs. It is in substance alleged that appellants, who were plaintiffs below, are the owners in fee simple of certain real estate (describing it) in the city of Terre Haute, Indiana; that on the tenth day of December, 1881, they executed an instrument purporting to be a trust deed conveying said land to Erwin S. Erney, trustee, and expressing the trust in the following terms, to wit: "For the uses and in trust as follows, to wit: That he will sell, convey, and dispose of said real estate at the highest price obtainable therefor, and pay over and apply the proceeds thereof on the liabilities of said Newton Rogers, as treasurer of Vigo county, Indiana, and for the relief of the sureties of said Newton Rogers on his official bond or bonds as such treasurer." That said instrument was executed solely as surety for the debts of said Newton Rogers, and without any consideration whatever to the plaintiff, Mary J. Rogers; that no part of the consideration came to her or

was used for her or for the benefit of her estate; that at the time of executing said instrument the plaintiffs were the owners of said land in fee simple as tenants by entireties, and said Mary J. Rogers was, and still continues to be, the wife of said Newton Rogers; that the defendants are unlawfully in possession of said land, and are unlawfully and forcibly excluding plaintiffs therefrom under and by virtue of the execution of said trust deed by plaintiffs to said Erney, to the damage of plaintiffs of one thousand dollars. They ask for the immediate possession of said property and that their title thereto be quieted, one thousand dollars damages for the detention thereof, and all other proper relief. The trial court sustained a demurrer for want of facts to said complaint. Appellants refusing to plead further, judgment was rendered for costs in favor of appellees. From that judgment appellants appeal and assign as error the action of the court in sustaining the demurrer to each paragraph of the complaint.

Section 6964 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 5119) provides ⁶³³ that: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void." This statute has been often construed by our supreme court. That tribunal has, in effect, held that "whenever the result of a transaction is such as to impose upon the wife's property a liability to answer for the debts of another, she must be regarded as surety and entitled to the protection of the statute." It is settled in this state that under the statute of 1881, section 6964 (5119), *supra*, a mortgage by a married woman upon her separate real estate to secure a debt of her husband or other person may be defeated by her in a suit on the mortgage, unless her conduct has been such as to make an equitable estoppel against her. It has also been held that land held by married women as tenants by entireties is within the protection of the statute: *Stewart v. Babbs*, 120 Ind. 568, 22 N. E. 770; *State v. Kennett*, 114 Ind. 160, 16 N. E. 173; *Crooks v. Kennett*, 111 Ind. 347, 12 N. E. 715; *Wilson v. Logue*, 131 Ind. 191, 31 Am. St. Rep. 426, 30 N. E. 1079; *Dodge v. Kinzy*, 101 Ind. 102. And that a mortgage executed by her husband and wife upon real estate so held to secure the debt of another is invalid both as to the husband and wife: *Crooks v. Kennett*, 111 Ind. 347, 12 N. E. 715; *McCormick etc. Co. v. Scovell*, 111 Ind. 551, 13 N. E. 58. That a married woman is not liable on her contract of surety-

ship in this state is not, therefore, an open question. In this case it is not questioned.

Counsel for appellant contend that the trust deed is a contract of suretyship, and is within the inhibition of the statute; that the trust deed possesses all the characteristics of and was in effect a mortgage. Counsel for appellee argue that the instrument in question was an unconditional deed of trust, and that the deed of the trustee conveyed a good title to the appellees, notwithstanding the fact that the money obtained was used in paying the debts of the husband.

Mortgages and deeds of trust have certain characteristics in common, but they are distinguishable. In 1 Jones on Mortgages, fifth edition, section 62, the author says: "There is a well-settled ⁶³⁴ distinction between a deed of trust and a deed of trust in the nature of a mortgage, the one being for the trust purposes unconditional and indefeasible, while the other is conditioned and defeasible, in the same way that a mortgage is."

In *Hoffman v. Mackall*, 5 Ohio St. 124, 131, 64 Am. Dec. 637, the court say that a deed of trust in the nature of a mortgage is a conveyance in trust by way of security subject to a condition of defeasance or redeemable at any time before the sale of the property. By an absolute deed of trust, the grantor parts absolutely with the title which vests in the grantee unconditionally for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of raising a fund to pay debts, while the former is a conveyance in trust for the purpose of securing a debt subject to a condition of defeasance.

In *Turpie v. Lowe*, 114 Ind. 37, 15 N. E. 839, at page 48 (114 Ind., 15 N. E. 839), the court, after quoting the syllabus of *Woodruff v. Robb*, 19 Ohio, 212, sets out the following portion of the opinion: "Now, the difference between a conveyance to a trustee, for the purpose of raising a fund to pay debts, and the conveyance for the purpose of securing a debt in case of the default of the debtor, by a time limited, is very apparent. In the first case, the title is vested absolutely, by the conveyance itself, in the grantee, for the purpose of the trust. The intention of the grantor is to part absolutely with his title. In the latter case, if the grantor perform his legal obligation, according to its terms, he retains his property. His title is as perfect as if such conveyance had never been made. The one is a deed of trust, the other a mortgage." In the same opinion the court quotes from the opinion of *Hoffman*

v. Mackall, 5 Ohio St. 124, 131, 65 Am. Dec. 637; both cases are cited with approval; citing also 2 Perry on Trusts, secs. 602a, 602g, and Shillaber v. Robinson, 97 U. S. 68.

So far as we are advised of its terms by the record, the instrument under consideration is, judged by approved definitions, an absolute deed of trust for the purpose named.⁶³⁵ Presumably, appellees are in possession as purchasers by virtue of, and in pursuance of, the execution of the power given to the trustee.

That husband and wife can convey real estate of which they are seised as tenants by entireties cannot be denied; nor that they can make such disposition of the proceeds as they may see fit. Had the land in question been sold and conveyed by appellants to a third party, it cannot be doubted but that they, or either of them, with the consent of the other, might have applied the proceeds to the payment of the husband's debts, or might have given it away, and thus passed a good title thereto. If this could have been done without the intervention of a trustee, we see no reason why it could not have been done by their trustee. "The purchasers of land under powers take under the deed in which the powers are created; it is as if the purchaser's name was inserted in the deed": 2 Perry on Trusts, 5th ed., bottom p. 178. "In all cases, the legal title is in the trustee under the trust deed if the deed purports to convey the title; such a title, however, is defeasible upon the performance by the grantor of the obligations undertaken by him. The performance of the conditions of the deed on the part of the grantor, or tender of performance before the sale, will defeat the power of sale in a mortgage or deed of trust": 2 Perry on Trusts, sec. 602.

As claimed by counsel for appellants, the purchasers took with notice of the purpose of the trust that the lands were to be sold to pay the debts of the husband. If the trust was faithfully discharged, its object was accomplished and its execution binding. The right of a wife to alienate her lands by joining in the grant with her husband is absolute; and as the proceeds are her separate property, she may apply them to the payment of her husband's debts, or to any other use. It follows that she may, her husband joining in the conveyance, convey an estate held with him by entireties, and, with his consent, make a like disposition of the proceeds.

⁶³⁶ If the instrument be held to be a mortgage, or a trust deed in the nature of a mortgage, the property being sold

thereunder pursuant to the power it gave, in the absence of fraud, the rights of the grantors were terminated. The mortgage of a married woman to secure the payment of the debt of another is not void, but voidable, and the defense of coverture is lost when it is not set up in the case of a mortgage before the decree or order of sale is made, and before the sale in the case of a trust deed: *Tuthill v. Tracy*, 31 N. Y. 157. See, also, the recent case of *Maynard v. Waidlich*, 156 Ind. 562, 60 N. E. 348. By section 3407 of Burns' Revised Statutes of 1894, every power, beneficial or in trust, is irrevocable unless an authority to revoke is named in the instrument creating the same.

From *Turner v. Johnson*, 10 Ohio, 204, 208, we quote the following: "In *Eaton v. Whiting*, 3 Pick. 484, it was holden by the supreme court of Massachusetts that while the power to sell, in a mortgage, was unexecuted, there was a right to redeem, and it remained in the mortgagor, until sale of the land, in pursuance of the power, to a person intending to take an irredeemable estate. In *President etc. of Bank of Metropolis v. Guttschlick*, 14 Pet. 19, it is said in the case of a trust deed, 'that unless there is some extrinsic matter of equity, the only right of the grantor is to what surplus money may remain after the liquidation of the debt for which the property was sold.'"

No fraud or irregularity is charged in the discharge of the trust; the sale was made presumably in all respects pursuant to the power.

Ability, not inability, is the rule as to the capacity of married women to enter into contracts. In *Nichol v. Hays*, 20 Ind. App. 369, 50 N. E. 768, this court decided that if a married woman, her husband joining her, conveys her separate real estate by deed of general warranty in payment of her husband's debt to the grantee, who accepts, she is liable on the warranty for failure of title.

But whether the instrument be considered an unconditional ⁶³⁷ trust deed or a trust deed in the nature of a mortgage, the purpose of the instrument having been carried out and the trust executed, the attempt after years of acquiescence to have the property restored to appellants is made too late. Appellants ask that that should be undone which was done pursuant to their direction. As disability is the exception to the capacity of married women to contract, the facts should clearly show the party seeking relief to be within the exception.

Judgment affirmed.

Estates by the Entireties are discussed in the monographic note to *Den v. Hardenbergh*, 18 Am. Dec. 377-389. A wife may convey or mortgage her interest in an estate held by herself and her husband as tenants by the entireties: *Branch v. Polk*, 61 Ark. 388, 54 Am. St. Rep. 266, 33 S. W. 424; *Howell v. Folsom*, 38 Or. 184, 84 Am. St. Rep. 785, 63 Pac. 116. But it is decided in *Wilson v. Logue*, 131 Ind. 191, 31 Am. St. Rep. 426, 30 N. E. 1079, that a mortgage and note executed by a husband and wife to secure the payment of a loan made to him cannot be enforced against her when the property embraced in the mortgage is held by them by the entireties. Compare *Trimble v. State*, 145 Ind. 154, 57 Am. St. Rep. 163, 44 N. E. 260.

Estoppel Against Married Women to avoid their deeds and mortgages is discussed in the monographic note to *Trimble v. State*, 57 Am. St. Rep. 170-177.

BOWLES v. INDIANA RAILWAY COMPANY.

[27 Ind. App. 672, 62 N. E. 94.]

MASTER AND SERVANT—EMPLOYE OR PASSENGER.—

If workmen engaged in constructing a trolley line are transported to and from their work in a conveyance furnished by the railway company, they are, while thus being transported, employes, and not passengers. (pp. 279, 281.)

MASTER AND SERVANT—EMPLOYÉ OR PASSENGER.—

If an employé is being carried by his employer in the conveyance of the latter to and from the work, the former is regarded, not as a passenger, but as an employé; though if he is being carried merely for his own convenience, pleasure, or business, he is a passenger. (p. 281.)

MASTER AND SERVANT—INJURY TO SERVANT—PLEADING.—The rule that requires an employé, in an action against his employer for personal injuries, to negative in his complaint the knowledge of danger involved in the employment, is not affected by a statute making it unnecessary for the plaintiff, in actions for personal injuries, to allege or prove the want of contributory negligence. (p. 282.)

O. M. Conley and H. C. Dodge, for the appellant.

W. L. Stonex and C. C. Black, for the appellee.

672 BLACK, J. The complaint of the appellant, a demurrer to which for want of sufficient facts was sustained, showed that he was in the employment of the appellee, constructing a trolley-wire line, being one of a number of workmen so engaged; that the appellee furnished a team and wagon, which was used for the purpose of transporting the appellant and his fellow-workmen from Elkhart to their work

on the line, and of transporting them back from their work to get their dinners, and at night when work had ceased, which team had been used for such purpose and had transported the appellant and the other workmen to and from this work for two months before the 11th of September, 1899; that the team "was fractious and what is called a runaway team," of which the appellee had knowledge at all times, and it had run away several times before that date, ⁶⁷³ all of which was well known to the appellee, whereupon the appellee, because of his knowledge aforesaid, hired a man as an expert teamster to drive and control the team in said work; that on the day above mentioned "said expert teamster" was in charge and driving the team, and the appellee represented to the appellant and his fellow-workmen that the team, handled by the expert driver, was perfectly safe in his charge, and that the appellant and his comrades would not incur any danger whatever in accepting such transportation by the team; that appellant believed that the team so managed and so handled, as represented by the appellee, was safe and would not run away; that on the day aforesaid the appellant and the other men were working on said line for the appellee, "and under and by virtue of said orders" were carried by said team, said driver in charge, at and upon the line, to continue their work, and were instructed that the team would return at dinner time, and that the appellant and the others would be transported by it to eat their dinner; that the team handled by said driver did go to the place where the appellant was at work, and took him and the others to a place where there was water, where they could eat their dinner; that after dinner, on the way back to work, the team ran away with the wagon and the appellant and others, with the expert teamster driving; that he partially succeeded in stopping the team, and when it was nearly stopped, the appellant attempted to get out of the wagon, whereupon the team again began to run, and by a sudden jerk, while he was so attempting, and by the sudden attempt to run again, the team threw the appellant upon the ground, and in the fall he broke his collar bone, etc., to his damage, etc.

In such a case it may be an important matter to determine whether the status of the person for whose injury the action is prosecuted was that of a passenger being carried by the defendant, either for hire or gratuitously, or ⁶⁷⁴ was that of a servant of the defendant. If a passenger, the defendant would be under obligation to exercise the highest care and would be

liable for injury through slight negligence, and the maxim respondeat superior would be applicable; but if a servant, the master would be under obligation to exercise only ordinary care, and would be liable for injury through the want of it, and if the injury accrued from one of the ordinary risks of the service, the hazard of which was assumed by the injured person as an employé, there could be no recovery.

In the case before us the conveyance of the plaintiff and his fellow-workmen by the employer was for the mutual convenience of the parties, no compensation being rendered or required. The transportation of the laborers was one of the means by which the employer procured the doing of the work. In view of the migratory character of the service, such transportation facilitated the prosecution of the work, and was beneficial to both employer and employés. It was, by the conduct of the parties, if not by their express agreement, an ingredient and instrumentality of the employment. It can hardly be said that the plaintiff was not in the employment of the defendant while so riding, in both a legal and popular sense. Such conveyance seems to have been contemplated by the parties as a matter within the regular course of the employment. It is true that the plaintiff's service did not include the management or care of the vehicle or of the horses drawing it, but it included the riding in the conveyance furnished by the employer as a means of prosecuting the work in the manner contemplated by the parties to the contract of service. It was arranged between the employer and the employé that the latter would thus go and come with his fellow-workmen, thereby expediting the work with greater convenience for all concerned. The employé was doing something for the employer when and by riding in the mode provided by the latter for the more convenient carrying forward of the master's ⁶⁷⁵ service, though at the same time the servant was participating in a privilege which he could have foregone without neglect of his service, though at trouble or cost to himself, and which therefore constituted some inducement, if not compensation, for the undertaking to perform the labor for which he was employed. It was connected with the employment. The defendant was not carrying the plaintiff gratuitously for the mere accommodation of the latter without regard to the relation between them created in their contract, but was doing so because of that relation and as an incident of the employment.

The general rule may be said to be that where an employé is being carried by his employer in the conveyance of the latter to and from the work for which the former is employed, he is regarded not as a passenger, but as an employé; though if he is being carried merely for his own convenience, pleasure, or business, he is a passenger: *Thompson's Carrier of Passengers*, 46, sec. 6; *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134; *Ross v. New York etc. R. R. Co.*, 5 Hun, 488; *Ross v. New York etc. R. R. Co.*, 74 N. Y. 617; *Vick v. New York etc. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; *McGuirk v. Shattuck*, 160 Mass. 45, 39 Am. St. Rep. 454, 35 N. E. 110; *Gillshannon v. Stony Brook R. R. Corp.*, 10 Cush. 228; *Abend v. Terre Haute etc. R. R. Co.*, 111 Ill. 202, 53 Am. Rep. 616; *Gormley v. Ohio etc. Ry. Co.*, 72 Ind. 31; *Sullivan v. Toledo etc. Ry. Co.*, 58 Ind. 26; *Cooper v. Wabash R. R. Co.*, 11 Ind. Ap. 211, 38 N. E. 823.

The relation between the parties, we think, was that of employer and employé; but whether their relation was such or was that of carrier and passenger, the injury not being shown to have been inflicted willfully, there could be no recovery without negligence on the part of the appellee. The complaint does not charge any act or omission of the appellee as negligent, or show that the injury was occasioned by the appellee's negligence. It is not charged that the appellee was negligent in the selection of the driver, or that ⁶⁷⁶ the driver in any respect was incompetent or negligent. Whatever might be the effect as evidence of the use of such a team for such a purpose, it cannot be said that a pleading thus showing the use of the team in care of a competent driver charges negligence without so characterizing the use in the pleading.

Instead of stating want of knowledge of the character of the team on the part of the appellant, and thereby negating the assumption by him of the hazard of the danger, it is indicated that he had known the fault of the team for two months, during which he had been riding to and from his work drawn by the same team.

In actions for damages brought on account of the alleged negligence of any person, copartnership, or corporation, for causing personal injuries or the death of any person, it is not now necessary in this state for the plaintiff to allege or prove the want of contributory negligence on his part or on the part of the person for whose injury or death the action is brought; but such contributory negligence is matter of defense, which

may be proved under an answer of general denial: Burns' Rev. Stats. 1901, sec. 359a.

But the well-settled rule that in an ordinary action against an employer to recover for the injury or the death of an employé through negligence of the employer, the plaintiff shall negative knowledge on the part of the employé of the danger through fault in the employment or retention of servants, or want of safety of implements or appliances, is not abolished or modified by this statute, such denial of knowledge being required for the purpose of showing that the danger was not voluntarily assumed as one of the ordinary risks of the service: *Indiana etc. Ry. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Louisville etc. Ry. Co. v. Sandford*, 117 Ind. 265, 19 N. E. 770; *Louisville etc. Ry. Co. v. Corps*, 124 Ind. 427, 24 N. E. 1046; *Evansville etc. R. R. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355; *Louisville etc. R. R. Co. v. Miller*, 140 Ind. 685, 40 N. E. 116; *Peerless Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927; *Louisville etc. R. R. Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214; *Clark County etc. Co. v. Wright*, 16 Ind. App. 630, 45 N. E. 817; *Chicago etc. R. R. Co. v. Wagner*, 17 Ind. App. 22, 45 N. E. 76, 1121; *McFarlan Carriage Co. v. Potter*, 21 Ind. App. 692, 51 N. E. 737; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465.

Where, the danger being equally open and known to both the employé and the employer, the former has voluntarily continued in the service making no complaint, and the latter has made no promise concerning it, there can be no recovery: *Big Creek Stone Co. v. Wolf*, 138 Ind. 496, 38 N. E. 52; *Diamond Plate Glass Co. v. De Horthy*, 143 Ind. 381, 40 N. E. 681; *Louisville etc. R. R. Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214; *Wolf v. Big Creek Stone Co.*, 148 Ind. 317, 47 N. E. 664; *East Chicago etc. Co. v. Williams*, 17 Ind. App. 573, 47 N. E. 26.

The pleading before us is so manifestly bad that it scarcely requires extensive comment.

Judgment affirmed:

Passenger or Employé.—An employé of a railroad company traveling from his home to his post of duty and back upon the cars of the company free of charge, as stipulated for in the contract of employment, is not a passenger: *Vick v. New York etc. R. R. Co.*, 95 N. Y. 267, 47 Am. Rep. 36; monographic note to *Illinois Cent. R. R. Co. v. O'Keefe*, 61 Am. St. Rep. 75, 97; *Ionnone v. New York etc. R. R. Co.*, 21 R. I. 452, 79 Am. St. Rep. 812, 44 Atl. 592. Other authorities hold that an employé of a railroad company who is given free transportation to and from his work is a passen-

ger while thus being transported: *McNulty v. Pennsylvania R. R. Co.*, 182 Pa. St. 479, 61 Am. St. Rep. 721, 38 Atl. 524; *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335, 37 N. E. 770; *Dickinson v. West End St. Ry. Co.*, 177 Mass. 365, 83 Am. St. Rep. 284, 59 N. E. 60.

An Employe Assumes Such Risks as are incident to the discharge of his duties, when he accepts the employment with full knowledge of the risks of his situation: *Hurst v. Kansas City etc. R. R. Co.*, 163 Mo. 309, 85 Am. St. Rep. 539, 63 S. W. 695. But see *Gundlach v. Schott*, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

**SMITH v. NEW ORLEANS AND NORTHEASTERN
RAILROAD COMPANY.**

[106 La. 11, 30 South. 265.]

CARRIERS—SPECIAL CONTRACT—GOODS IN BOND.—
If a carrier is clearly instructed to carry goods "in bond," and, disregarding such instructions, takes the goods out of bond without authority, thus rendering them of less value and causing a loss at the point of destination, he is liable for actual damages. (p. 290.)

CARRIERS—SPECIAL CONTRACT—LIABILITY OF CONNECTING CARRIERS.—If goods are shipped "in bond" over connecting lines, and both carriers participate in taking them out of bond, contrary to instructions, thereby rendering them of less value and causing a loss at the place of destination, the liability for the actual damages is solidary as between the two carriers. (p. 292.)

H. J. Leovy and Rice & Montgomery, for the appellants.

Denegre, Blair & Denegre and H. H. Hall, for the appellee.

¹¹ BREAUX, J. Plaintiff claims damages in the sum of two thousand one hundred and eighty-two dollars and sixty-six cents, growing out of defendant's ¹² failure to carry a consignment of rice in bond. Plaintiff avers, substantially, that two hundred and eighteen thousand two hundred and sixty pounds of rice were shipped to it from Hamburg on the steamship "Dalmetia," due to arrive in Charleston, South Carolina, in May, 1898; that through their agents, the defendant railroads applied to plaintiff for the transportation of the consignment over their line of railroads from the port above named to New Orleans; that plaintiff made known to these agents that it wanted the rice carried

in bond, as sanctioned by a statute of the United States (without custom duty), and that for that reason they were not willing to pay the custom duty of two per cent per pound at the port of Charleston; that after having been informed of plaintiff's desire, the defendants' agents advised it of their willingness and ability to transport this rice on the conditions before stated; that on receiving this information, plaintiff delivered its bill of lading to the agents of the Northeastern Railroad Company, who promised to make all needful arrangements with the steamship before named and with the custom-house authorities at Charleston, and with other connecting railroads, for the transportation of the rice through to New Orleans in bond, without payment of custom duties; that the said railroad company bound itself to deliver this rice in bond to plaintiff in New Orleans for twenty-five cents per hundred pounds for all charges.

The invoice, dated May 10, 1898, issued in Hamburg for the one thousand bags of rice in question, which, in due time, was placed in the hands of the "Plant Railroad system" after the arrival of the steamship "Dalmetia" at Charleston, among other statements, contained the following: "To be shipped per Str. 'Dalmetia' to Charleston in bond for New Orleans." On May 25th, the agent here wrote to the representative of the "Plant system," inclosing the invoice to which we have just referred. The letter contained the following, among other statements: "As I understand it, the Plant system is a bonded line, and there will be no difficulty in handling the business to New Orleans. All custom-house duties to be paid here by Smith Bros. & Co., Limited."

A member of the plaintiff firm testified that when he delivered the bill of lading to the agent in New Orleans, in the presence of the agent of the "Plant system" who was here at that time, he stated to them that it was necessary for the rice to come in bond. He also stated as a witness that he declined to turn over his rice to a rival system of railroads to be hauled for the same rate, as he was led to believe that the "Plant system" was a bonded road.

¹³ As relates to the "Plant system," its codefendant, the New Orleans and Northeastern Railroad Company, charges that the former agent of the "Plant system" falsely represented that their system was a bonded line, and also represented that they could bring the rice from Charleston to New Orleans without the payment of duty, and that they paid

the duty, although well aware that they ought not to have paid it. This defendant avers that the judgment of the lower court released the New Orleans and Northeastern Railroad Company from all liability, and held its codefendant, the "Plant system," for the damages, because it had not committed the breach of contract of which plaintiff complained; that it was pretended by the officers of the "Plant system" that their officials had been misled by a letter of instructions sent by the agent of the New Orleans and Northeastern Railroad Company, a position not sustained in the district court; that the officers of the "Plant system" always understood that the rice in question was to be shipped in bond; that they were informed by the customs officials in Charleston that their line was not a bonded road, and, instead of notifying plaintiff, they purposely withheld the information until June 2d, and after they paid the duties, and that this was done only in order to cover the freight upon the haul.

It appears that about June the rice arrived in New Orleans, but not in bond, in violation of the agreement to which we have just referred. The New Orleans and Northeastern Railroad Company refused to deliver the rice to plaintiff without payment to it of the custom charges, amounting to four thousand three hundred and sixty-two dollars and twelve cents, and the freight charges of twenty-five cents per hundred pounds. To prevent loss and to avoid a forced sale, plaintiff paid these amounts under protest, and reserved all of his rights to sue for and recover the amount thus paid to this railroad.

Plaintiff in its petition sets out at some length the loss it incurred in consequence of defendants' disregard and violation of the agreement as stated, growing out of the fact, it avers in substance, that the rice could have been more profitably handled and sold here in bond than with the custom duties paid, for the reason that if it had been in bond it could have been exported to foreign markets, or it could have been sold to the United States government, which, at the time, was buying large quantities of such food for its armies, and, further, that plaintiff could not profitably handle so large a quantity of rice not in bond, owing to the limited sales of rice in the local market at the time; plaintiff charges that all these facts were well known to the defendants when they promised to transport the rice in bond.

¹⁴ Plaintiff avers that it had to sell this rice in the local market for less than it cost, and that if the defendant had

complied with their contract as a common carrier, instead of losing, it would have made a profit. It claimed from the defendants in solido the amount of loss it alleges it has sustained and the profits it would have made. The final balance of the exhibit annexed to the petition reads: "Actual loss per pound, \$.0156."

The defendants filed separate answers. The New Orleans and Northeastern Railroad Company admits that a consignment of rice was made to the plaintiff as alleged, and especially avers that it was agreed by its agent with the agent of the "Plant system" that the rice was to come from Charleston to New Orleans over the "Plant system" and this defendant's road in bond, and that it was understood that the customs duty of two cents per pound should not be paid in the port of Charleston.

This defendant avers that it was in no wise responsible for the failure of the "Plant system" of railroads to carry out the instructions received or to fulfill the undertaking it had assumed, and that if any payment of the duty in question made by the "Plant system" has violated any contract with plaintiff, this defendant is not responsible for its violation.

The other defendant, the "Plant system," alleges, in substance, in its answer, that if any damage has been suffered, plaintiff alone was at fault in communicating its instructions and purposes to the agent of the New Orleans and Northeastern Railroad Company, or in the misleading instructions given to the representative of the "Plant system" by the agent of the New Orleans and Northeastern Railroad Company.

The judgment of the district court is in favor of plaintiff and against the defendant the "Plant system," for the sum of two thousand one hundred and eighty-two dollars and sixty-six cents, with legal interest from June 22, 1898, and sustains the writ of attachment sued out by plaintiff. As relates to the New Orleans and Northeastern Railroad Company, the district court rejected the demand of plaintiff.

There is no question but that the plaintiff desired to have the rice carried from Charleston to New Orleans in bond, and that ample notice of plaintiff's wish in this respect was given to the agent of the New Orleans and Northeastern Railroad Company in New Orleans. We think that it is equally as evident that the "Plant system" was aware ¹⁵ of the instructions given by plaintiff for hauling the rice in bond. While it is true the testimony is conflicting, one of the mem-

bers of the plaintiff firm who testified and the agent of the New Orleans and Northeastern Railroad Company agree in the statement that such was the instruction received and afterward communicated to the officials of the "Plant system." The agent of the "Plant system" admitted, as a witness, that his understanding and that of the agent of the New Orleans and Northeastern Railroad Company was that the "Plant system" was a bonded line, but this was error, as the "Plant system" was not a bonded line for south-bound freight from Charleston.

We will not dwell upon this particular issue at any length. Before passing to the consideration of another ground of the decision, we will state, without the least hesitation, with reference to one of the defendants, the "Plant system," that it must be held to have been fully informed of plaintiff's intention regarding this consignment.

Indeed, both the defendants knew that the goods were to come to New Orleans in bond. But, while virtually conceding this, the defendants urged that they did not know and that plaintiff did not make the least attempt to inform them of the fact that it, plaintiff, wished to sell the goods to the United States government or to ship them, duty unpaid, to another country. This defense is particularly urged by the "Plant system." The contention on its part is that the New Orleans and Northeastern Railroad Company did not specifically explain to or instruct its codefendant (the "Plant system") as to the intention of plaintiff regarding the sale to the United States or a reshipment of the goods, as just stated, and that it, the "Plant system," had the right to infer that the only possible damage that plaintiff could suffer would arise from the payment at Charleston instead of at New Orleans, and that as no damage could have arisen in that case, none was due. This is the important question involved.

The proof is that the grade of rice in question could not compete in New Orleans with the domestic rice, and that it was quite evident that the rice was only suitable for exportation from the port of this city. In answer to the proposition that the low quality or grade of the rice was warning enough not to take it out of bond, that it must have been evident from that fact that it was intended for exportation, defendants deny that this was a warning or notice at all. We can only say, in deciding the question, that whether that fact was in itself a ¹⁶ warning or not, defendants should not have taken the goods out of bond.

Viewed in the most favorable light, defendants' action was hasty and ill-advised. They must or should have known that the owner had an object in importing this rice in bond. A member of the plaintiff firm testified positively that one of the agents of the "Plant system" had been informed of the object. There are circumstances sustaining the correctness of that statement. The right to ship in bond was absolute and defendants should have been extremely slow in interfering with the right without special instructions.

In the presence of the testimony, and in view of the surrounding facts and the rights of the parties, we do not think it possible, in justice and reason, to arrive at the conclusion that defendants were justified. The rice was intended by the owner for exportation or for sale to the United States, and it was not for defendants to assume that it was intended to be sold in New Orleans.

It is evident that on receipt of the rice in bond, the plaintiff would have exported it if it had been to its advantage. It appearing that it would have been profitable at the time to export this rice, it is not for defendants to set up the defense that, if it had been sold to the United States government, the receipt in bond would not have been of any benefit. The test, as relates to the measure of damages, is the disposition which plaintiff might have made of it by exportation, if exportation was to its benefit.

On this point the defendants insist, substantially, that no consequence which is not the necessary and ordinary result of a breach of the obligation can be supposed to have been contemplated unless full information be imparted to the party sought to be held liable at the time of entering into the engagement; in other words, that the "special circumstances" rendering it important to plaintiff that the goods should arrive in New Orleans in bond were not communicated to the defendants, who, therefore, cannot be held to have contemplated or to have foreseen the damages which might result from the duties being paid in Charleston, citing articles 1934-1943 of the Civil Code and a number of decisions.

True, in this case, the defendants were not guilty of fraud or bad faith, and, in consequence, the question falls in some degree within the meaning of the articles just cited. But we are inclined to the opinion ¹⁷ that these articles are not as restricted in their scope as defendants would have us take them. The words of one of the articles are: "Such damages

as were foreseen or might have been foreseen." We think that the special condition attached to enable one to recover damages was directly brought home to defendants by the recital contained in the invoice in their possession. The damages resulting from the breach might have been foreseen. The loss in the value of the goods was a direct consequence of the breach of the obligation. Besides information had been imparted to at least one of the defendants, if not both, ample enough to warn either or both not to pay the duty. This, as we think, brings the case within the rule furnished by the cases cited by the defendants, the leading case being *Hadley v. Baxendale*, 9 Ex. 314. The decisions rendered under the common and civil law systems, in our opinion, do not hold that one is not responsible unless every damage possible is brought home to him in express terms at the time the obligation was assumed. It is true that the loss is limited to the thing which was the object of the obligation.

Pothier (Dupin's edition, volume 1) illustrates the principle thus: "Let us suppose that I have sold a thing having a well-known value in the market, and which I bind myself to deliver within a certain time, and that I failed to comply with my obligation. If in that time the article had increased in value and it could no longer be purchased at the same price, the increase in price which the buyer from me is obliged to pay is a damage which I owe, because it is damage suffered propter rem ipsam non habitam, which is in touch with the thing which is the object of the contract and which I might have foreseen." This authority then gives examples of damages which could not have been foreseen. The latter do not cover defendants' case. Pothier's view has the support of the civil-law authorities.

To conclude upon this subject, the carrier who takes goods of a merchant out of bond, without instructions, and despite the circumstances indicating that they had a value in bond, is not in the situation of one who could not have foreseen the possibility of accruing damages.

The responsibility of the defendants between themselves gives rise to the next question. The New Orleans and North-eastern Railroad Company insists that the breach of the obligation was committed by the "Plant system," and the "Plant system," on the other hand, contend that they only carried out instructions communicated by the agent of the first-named

road. A letter was introduced in evidence, written by ¹⁸ the agent of the New Orleans and Northeastern Railroad Company, instructing the "Plant system" to pay the customs duties. This was understood, the "Plant system" contend, as including all customs duties paid. There were two or more different statements in this letter, one leading to the inference that it was the carrier's wish (that is, the New Orleans and Northeastern Railroad Company) that the duties be paid in Charleston, and the other that, in compliance with its desire, they must not be paid. There was direct contradiction in the letter. The writer's testimony was admitted to explain the meaning of the letter. To this explanation, counsel for the "Plant system" objected and reserved a bill of exceptions to its admissibility. For the reasons just stated, the letter was confusing and ambiguous. The explanation was properly heard. This witness said that by the words in the letter, "If any customs duties accrued at Charleston, please have same paid and billed against the shipment," he meant if any charges accrued while the shipment was in bond, same were to be paid and billed against the shipment. The other testimony of this witness in this connection does not relieve his company (the New Orleans and Northeastern Railroad) from all responsibility. It remains that these defendant companies acted together. One was the continuing line of the other in carrying this freight. They both obligated themselves as carriers, and each, we think, took a part in securing this freight and to that end in taking it out of bond. The information gained by one of the officials at one end of the line was communicated to the other at the other end. The errors of each in the interest of both, and with the sanction of both, do not present issues enabling us to conclude that the damages were all due by one of these railroads.

As relates to the amount, we do not think that the testimony would justify us in reducing it lower than found due by the judgment of the district court.

For these reasons, the judgment of the district court is avoided, annulled, and reversed, and it is now ordered, adjudged, and decreed that there be a judgment in favor of plaintiff against defendants in solido for the sum of two thousand one hundred and eighty-two dollars and sixty-six cents, with interest at five per cent from June 22, 1898, until paid. It is further ordered that the writ of attachment herein issued

be maintained with plaintiff's lien and privilege on the property attached.

Costs of appeal are to be taxed to defendants and appellants.

Monroe, J., concurs in the decree.

Rehearing refused.

Connecting Carriers may be Jointly Liable for losses or injuries upon any part of the line: *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434. Compare *Hot Springs R. R. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65; and see the monographic note to *Wells v. Thomas*, 72 Am. Dec. 230-247, on the liabilities of connecting carriers. That one in whose hands goods are found injured is presumed to have caused the damage: See *Gwyn Harper Mfg. Co. v. Carolina Cent. R. R.*, 128 N. C. 280, 83 Am. St. Rep. 675, 38 S. E. 894.

SONIA COTTON OIL COMPANY v. STEAMER "RED RIVER."

[106 La. 42, 30 South. 303.]

CARRIERS—SEQUESTRATION.—A CONSIGNEE IS OWNER of the goods until the contrary appears, and may maintain an action and sequestration against the carrier or his agent for their recovery. (p. 295.)

CARRIERS—SEQUESTRATION—GROUNDS FOR.—If, upon the arrival of goods at the place of delivery, the carrier fails to deliver them, and leaves with an apparent intention to carry them to another place, the consignee is entitled to resort to suit and sequestration to compel the delivery of the goods. (p. 295.)

CARRIERS—DELIVERY—FAILURE OF CONSIGNEE TO ACCEPT.—A carrier must offer to deliver the goods at a proper place and in a proper manner, and if the consignee fails to accept them, the carrier must put them in a place where they will not be exposed to loss. (p. 295.)

CARRIERS—BILLS OF LADING—PRESUMPTION—EVIDENCE TO VARY.—In the absence of fraud or error, a conclusive presumption arises in favor of a bill of lading, as written; but if error is committed by including terms in it binding the carrier to deliver the goods at an inconvenient and expensive place, the carrying part of the contract may be explained by parol evidence. (p. 297.)

CARRIERS—BILLS OF LADING—DELIVERY.—In case of error in a bill of lading as to the place of delivery, the carrier has no right to retain the goods, without an effort or offer to deliver and carry them beyond the place of delivery named in the contract. (p. 297.)

CARRIERS—DELIVERY.—Landing a portion of the goods at the place of delivery, and then returning them to the vessel and

proceeding with the voyage, is not a sufficient delivery to exonerate the carrier from failure to deliver. (p. 297.)

CARRIERS — DELIVERY — TENDER OF FREIGHT CHARGES.—Before delivery, or effort to deliver the goods at the place of destination, the carrier is not entitled to any tender of freight charges. (p. 297.)

White & Thornton, for the appellants.

J. H. Overton and R. P. and R. A. Hunter, for the appellee.

⁴² **BREAUX, J.** This was an action commenced in the district court by plaintiff to recover possession of one hundred tons of cotton seed, and to recover damages for the asserted wrongful detention of the seed. ⁴³ A writ of sequestration was issued at the instance of plaintiff and the cotton seed sequestered. The defendant pleaded the general issue and especially pleaded that plaintiff was not the owner of the seed, and denied that they had refused to deliver the seed, and averred that they offered to deliver it at the landing. Defendants set up in their answer that no tender was made of freight charges.

Defendants, averring that the sequestration issued unnecessarily, reconvened for the amount of freight charges and damages for the alleged illegal sequestration. The testimony discloses that plaintiff was the consignee of the cotton seed shipped to its address on the steamer "Red River," and that it had sufficient interest to sue for the seed when the suit was filed. The bill of lading issued by the steamer "Red River" stipulated that the seed was to be delivered, without delay, unless prevented, on the levee at Alexandria, where the carrier's responsibility should cease, unto the Sonia Cotton Oil Company, Limited. There were about sixteen hundred sacks containing this seed. It required a great deal of hauling to haul them up.

The steamer, on her way down from up the river, landed in front of Alexandria on Sunday, the fourth day of November, 1900, at about noon, and began putting out the seed in question at the foot of a high bank on a sandbar. The Sonia Oil Company, Limited, claimed that the seed should be delivered on top of the bank or levee, for the reason that there was at the time a threatening rise of the river that would overflow the sandbar and injure the seed. The captain of the boat persisted in putting the seed on the bar. After a little time, and some talk between representatives of plaintiff and the captain, he stopped the work of unloading the seed

and ordered the return to the boat of the few sacks that had been landed, about fifty sacks. Plaintiff urges that defendant said at the time that he stopped the unloading that he would take the seed to New Orleans and sell it there. The boat and accompanying barge left the landing with the seed on board and crossed over from Alexandria to Pineville, and was taking on other freight. Meanwhile plaintiff filed this suit and obtained a writ of sequestration. The boat then returned to the Alexandria side of the river and was tied up at the wharf, where it remained, owing to the sequestration, until 3 o'clock the next day. The seed, on Monday, was taken from the boat to the landing by order of the sheriff.

The evidence informs us that there is first a sandbar where the unloading of the boat was commenced when plaintiff's agent objected, and ⁴⁴ in the direction of the city, after leaving the sandbar there is a ledge, and afterward a rising onto the levee. This is about all that need be said about the locus of the landing.

We take up, in the first place, for decision the question of the ownership of the seed. The issue is not directly raised, and is before us only on a plea of general denial. Defendant is not greatly concerned in matter of the ownership of the seed. It claims the freight from plaintiff, and also claims that it has done everything it was called upon to do in carrying out a contract of affreightment. These defenses are not consistent upon their face with the defense that plaintiff is not the owner. Besides, the consignee named in the bill of lading is, for all purposes, considered as the owner of the goods, and the carrier is entitled to treat him as the owner until the contrary appears. The shipment in itself, until it is shown that the consignee is not the owner, vested him with the title of owner: Hutchinson on Carriers, sec. 130. There is no evidence before us going to prove that the property was not owned by plaintiff. On the contrary, all tends to show that plaintiff was the owner.

This brings us to a consideration of the testimony upon which the writ of sequestration was issued. This testimony has bearing upon the merits of the case as well as upon the right to the writ of sequestration.

After the difference had arisen between plaintiff and defendant regarding the sale and proper place to land the goods, the defendant did not stand upon the right he claimed to deliver them upon the sandbar to which we have before re-

ferred. He immediately ordered the sacks containing the seed to be returned to the boat. He made no offer to the plaintiff to deliver them or the least attempt at tender of his property to plaintiff. The conduct and utterances of defendant were such as to give rise to the apprehension that he would take the goods out of the jurisdiction of the court. After they had been returned to the boat, it left the landing and crossed to the other bank. In our judgment, defendant should have made a tender of the goods in order to sustain his rights under the contract. Plaintiff was entitled to the cotton seed, and upon defendant's failure to deliver it, plaintiff could resort to a suit to compel its delivery. When the goods are not accepted by the consignee, it devolves upon the carrier to put them in a place where they will not be exposed to loss. When this is done, his obligation to do, under the contract, is at an end. He is then no longer liable under his contract of affreightment. Delivery must be made at a proper place ⁴⁵ and in a proper manner. Here there was not a persistent and complete attempt at performance. From all appearances, the destination of the goods was being changed when process issued. "The destination of the goods, when owned by the consignee, cannot be changed without his consent": Hutchinson on Carriers, sec. 135.

The terms of the bill of lading gave rise to the next issue before us for consideration. These terms, on the face of the bill, bound defendant to place the goods on the levee at Alexandria. But it is urged on the part of the defense that this stipulation was an error on the part of the carrier; that it was not possible, consistently with the interest of any public carrier, to carry the goods from the boat to the top of the levee; that this clause in the bill did not cover obligations covered by any custom; that the place at which defendant offered to land the goods was the usual place. The testimony on this particular point is conflicting. Plaintiff contends that in view of the rise in Red river which was coming on that the landing at that place was not safe. The cause for apprehension on this score is sustained by the weight of the testimony. Granted that it was extremely inconvenient and more expensive than usual to carry the goods to the top of the levee, it does appear that, under the circumstances, defendant should have carried out the conditions of the contract as written as near as practicable. We have not found that this was attempted. The defendant commenced to unload on the line

of the sandbar near the water, and the testimony does not disclose that it was the intention then to place them anywhere else.

Mr. Hutchinson, in his work cited *supra*, says that where the contract of carriage specifies the wharf, dock, or other landing place at which the delivery shall be made, the contract must of course govern in this respect, unless some other place be substituted by the parties: Hutchinson on Carriers, sec. 366.

In *Hunt v. Mississippi Cent. R. R. Co.*, 29 La. Ann. 446, this court held that a bill of lading to the extent that it is a receipt may be explained, while that part of it which is a contract cannot be explained by parol testimony. The bill of lading, to the extent that it confesses the delivery and acceptance of the goods by the carrier, is a receipt. In other respects, it is a contract, and the contract particularly covers the obligation of carrying the goods to destination and of delivering them to the consignee. From that point of view, the carrier was bound to carry the merchandise to Alexandria, and there deliver it in accordance with the terms of the bill of lading: Hutchinson on Carriers, sec. 126.

In the absence of fraud or error, a conclusive presumption arises in ⁴⁶ support of the bill of lading as written, but if error was committed, as contended, by including terms in the bill of lading binding the carrier to deliver the goods on the top of the levee, the carrying part of the obligation may be explained. Taking the foregoing as true, that error in the bill of lading may be explained. None the less the defense urged is not sustained, for the reason that there was no right in the defendant to retain the goods. This question was carefully considered and determined by the supreme court of the United States in the case of *Mordecai v. Lindsey* (*The Eddy*), 5 Wall. 481. With reference to the right of the carrier to retain the goods until the charge for the freight is paid, Mr. Justice Clifford, for the court, said: "His right to do is beyond doubt, but he cannot detain the goods on board the ship until the freight is paid, as the consignee or owner of the cargo would then have no opportunity of examining their condition. Delivery on the wharf, in the case of goods transported by ships, is sufficient under our law, if due notice be given to the consignees, and the different consignments be properly separated so as to be open to inspection and conveniently accessible": *McCullough v. Hellweg*, 66 Md. 269, 7 Atl. 455.

By the contract, the cargo was to be delivered at Alexandria. The arrival of the vessel at the wharf and the landing of a few sacks which were returned to the steamboat on the order of the captain was not a compliance with the carrier's obligation, even if the captain was entirely in the right regarding the place selected by him to put the seed. There was not even a partial compliance with the terms of the contract.

One of the issues before us is whether an actual tender of freight charges should have been made. The testimony shows that there was a seasonable offer to pay the amount due. The defendant positively declined to listen to any offer of payment. The captain was intent upon retaining the goods and carrying out his views of responsibility under the contract. He refused to accept the tender of payment, not because insufficient, but on other grounds entirely. One should not be required to do a vain thing. It is manifest that had the full amount been tendered in currency of well-known legal tender, it would have been refused. Besides, before completing performance by a required delivery or effort to deliver the goods, the defendant was not entitled to any tender at all.

For reasons assigned, it is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

Rehearing refused.

Carriers.—The Title to Goods in the hands of a carrier is in the consignee: *Miami Powder Co. v. Port Royal etc. Ry. Co.*, 47 S. C. 324, 58 Am. St. Rep. 880, 25 S. E. 153.

Carriers.—Delivery of Goods at the place designated is necessary to relieve a common carrier from liability as such: *Schen v. Benedict*, 116 N. Y. 510, 15 Am. St. Rep. 426, 22 N. E. 1073. And if a consignee is in default in not receiving freight, the carrier cannot abandon it, but is required to exercise ordinary and reasonable care for its preservation as a warehouseman: *Gregg v. Illinois Cent. R. R. Co.*, 147 Ill. 550, 37 Am. St. Rep. 238, 35 N. E. 343. Though his liability as an insurer ends when the consignee does not act promptly in taking the freight: *Tarbell v. Royal Exchange Ship. Co.*, 110 N. Y. 170, 6 Am. St. Rep. 350, 17 N. E. 721.

Carriers.—Freight.—A common carrier receiving goods for carriage, without requiring prepayment of freight charges, is not entitled to demand such charges until his duty of carriage has been performed, either by delivery or an offer to deliver at the place of destination: *Grand Rapids etc. R. R. Co. v. Diether*, 10 Ind. App. 206, 53 Am. St. Rep. 385, 37 N. E. 39, 1069.

A Bill of Lading, except as to the acknowledgment of the receipt of the goods, and their quantity and condition when received, cannot be varied by parol evidence: *McElveen v. Southern Ry. Co.*, 109 Ga. 249, 77 Am. St. Rep. 371, 34 S. E. 281.

LYONS v. ANDRY.

[106 La. 356, 31 South. 38.]

HOMESTEAD—DEATH OF SPOUSE.—A homestead right is not necessarily terminated by the dissolution of the community, caused by the death of the husband or wife. (p. 299.)

HOMESTEADS—CHANGE OF RESIDENCE—ABANDONMENT.—If a person claiming a homestead has actually resided upon the property with his family, the fact of a change of residence to some other place does not, of itself, cause a forfeiture of the homestead right, though it may be evidence of an intention to abandon, and, coupled with other facts, may establish it. (p. 301.)

HOMESTEADS—ABANDONMENT.—CHANGE OF RESIDENCE from a homestead to an adjoining place, if the result of calamity, and not a voluntary act, is not proof of an abandonment of the homestead. (p. 301.)

HOMESTEAD RIGHTS MUST BE UPHELD unless clearly shown to have been abandoned. Continued personal occupation of the premises is not essential to the preservation of the right, and how long an absence will work a forfeiture must depend upon the circumstances of each particular case. (pp. 302, 303.)

HOMESTEADS—HEAD OF FAMILY—DUTY TO SUPPORT CHILD.—A daughter eighteen years of age living with her father and rendering him her services is dependent upon him for support, though able to earn her own living, and entitles him to a homestead right. (p. 304.)

A. E. and O. S. Livaudais, for the appellant.

J. Wilkinson, for the appellee.

³⁵⁶ NICHOLLS, C. J. Eugene Andry, the defendant in the above suit, prayed for and obtained a preliminary injunction in the district court, upon allegations that he owned certain real estate in the parish of Plaquemines, which he described, and which, he alleged, did not exceed in value the sum of one thousand dollars. That he was a head of a family having persons dependent upon him for support; had since the twenty-fourth day of November, 1880, resided upon said property, which he, on said day, declared his homestead and caused the evidence of said declaration to be registered in accordance with articles 219 and 220 of the constitution of 1879, and act 114 of 1880, in the records of this parish, as appeared by reference to the said declaration and the certificate of recording of the same, which were ³⁵⁷ annexed to and made a part of this petition. That, furthermore, petitioner was entitled to claim said property as a homestead under article 244 of the constitution of 1898. That, acting under and by

virtue of a writ of fieri facias issued in the suit of Mrs. P. Lyons v. Eugene Andry et al., No. 439, of the docket of this court, Mrs. Patrick Lyons, plaintiff in said suit, and the sheriff of this parish had seized, taken in their possession, and threatened to sell the above-described property to pay and satisfy the amount of the judgment rendered against petitioner. That, unless prevented by due process of law, petitioner feared and verily believed and apprehended that they would thus dispose of his property, all to his irreparable loss, damage, and injury, and notwithstanding all protestations and remonstrances, and that a writ of injunction was the only equitable remedy in the premises.

The plaintiff, Mrs. Lyons, answered, praying that the injunction be dissolved with damages against the plaintiff and the sureties on the injunction bond. She averred that the plaintiff in injunction was not entitled to any homestead on the property seized, because he did not reside thereon, had no person or persons legally dependent upon him, and that the same was not set apart and registered as required by law.

The district court dissolved the injunction, with twenty per cent damages against plaintiff in injunction and the sureties on his bond, and Andry appealed.

We do not understand appellee to contest the fact that the property was originally legally claimed and held as a homestead. The question is, therefore, whether, having been properly a homestead at one time, it has ceased to be such: 1. By reason of the death of the wife, carrying with it, as a result, the dissolution of the community between herself and Andry, vesting title to an undivided half thereof in the wife's heirs, subject to a right of usufruct by the husband upon that half during his natural life, unless he should remarry; 2. Because the homestead right has been lost by nonresidence upon the property; 3. Because Andry has no longer anyone dependent upon him for support.

The first ground for nonexemption claimed by the appellee is answered adversely to it by the very terms of article 219 of the constitution of 1879, and article 244 of 1898. This court had occasion ³⁵⁸ to so declare recently in the case of Maxwell v. Roach, 106 La. 128, 30 South. 251.

The evidence taken on the trial of the case was to the effect that Andry's wife died in 1900; that there were ten children born of their marriage—five sons and five daughters; that one of the daughters died; that all of the sons are of age, and all

but one married; that the daughters are all of age and married but one, a girl of eighteen years of age. Andry testified that he left his place in 1893, because the storm of that year blew his home down; that he was, at the time of the trial, staying about three-quarters of an acre from his place; that there was no dividing fence or ditch between his place and that on which he was stopping; that his son Felix was leasing the place at which he was stopping, which belonged to Mr. Ballay; that he was on his place every day; he was cultivating truck on it—that that was his way of earning a living; that there was a little shanty on the property seized, a small shanty with one room, in which his son Seraphin sleeps; the room is ten by twelve feet, with flooring, and is covered with shingles; that he (witness) never left the place, and was on it and worked on it every day that it was needed; he had his corn and his potatoes there at the time of testifying; he had only one place to sleep, which was at his son Felix's; he had only one room or rather one bed there; he ate very seldom with his son; the eighteen year old daughter cooked, washed, and sewed for him—did not cook for his son.

Felix Andry testified that the room which his father occupied at Mr. Ballay's was a small one; he and his sister alone occupied it—it was a medium or small room, very little furniture in it; there is a bed in it, a very little partition is between the wall and the bed; his brother (Seraphin) made rice on his father's place that year; he alone, but Mr. Ballay made him the advances to make the crop; he also made a crop on part of Mr. Ballay's place; the two places on which he made the crop made but one rice field combined.

On the examination of the father as a witness he was asked "how it was that he had not rebuilt his house on that place; also what the room in the shanty in which his son slept was used for before the storm; also how old he was." These questions were objected to by the seizing creditor's counsel, and the objections sustained. The objection to the first question was that plaintiff in injunction had alleged that he was residing on his homestead on the seized property, and that he could not contradict the allegations of his own petition by attempting ³⁵⁹ to show the reasons why he was not residing thereon in a habitation; the objection to the second question was that it was irrelevant and not responsive to the issues tendered in the pleadings, and the objection to the third question was that there was no issue as to age.

Counsel of appellant states that the object of the first question was to show that he was too poor to rebuild his house.

The property exempt from execution as a homestead in this state, by the constitutions of 1879 and 1898, is declared to be property "bona fide owned" by the debtor and "occupied" by him. The word "occupy" is defined by the Century Dictionary as "to take possession of; seize; take up; employ; to take possession of and retain or keep; enter upon the possession and use of; hold and use; especially to take possession of a place (as a place of residence or, in warfare, a town or country) and become established in it. Intrans. 1. To be in possession or occupation; hold possession; be an occupant; have possession and use."

We are to determine whether the seised debtor owned and occupied and still "owns and occupies" the property which he claims as his homestead.

As he actually resided upon the property at one time, and was entitled to a homestead, the question before us is whether he has lost his homestead rights by abandonment. If those rights are dependent upon an actual, continued, and continuous personal "residence" upon the property of himself and the person or persons dependent upon him for support, his rights have ceased to exist, for it is not claimed that such conditions have existed since 1893. At that date all parties ceased to have an actual "residence" upon the property. It is very generally recognized that after a party claiming the homestead has actually "resided" upon the property with his family the fact of a change of the residence to some other place does not, of itself, per se, cause a forfeiture of the homestead right, though that fact may be "evidence" of an intention to abandon, which, when coupled with others, may establish it.

In this case the change of residence in 1893 was not a voluntary change, but the result of a calamity. At that time a violent storm destroyed the residences of a large number of persons in the parish of Plaquemine, and, among others, that of the plaintiff in injunction. Possession of the property itself was not, however, lost. Under the evidence it has been always retained by Andry.

³⁶⁰ It was not leased to others, but was used continuously for "truck" cultivation by the owner, though a part of it was, by his permission, utilized by one of the sons of the family (who slept in the single room of a small building which had

not been destroyed by the storm) in making a crop of rice. Andry, at the time of the trial, had his corn and potatoes on the property and went upon it almost daily for the purposes of cultivation. The residence was shifted to the adjoining place at a point about three-quarters of a mile away from the boundary line between two properties, between which there was neither fence nor ditch.

Residence at the new place was precarious, inasmuch as it was with another son whose own tenure was that of a mere lessee, which might terminate at any time. What Andry and his daughter would do under that contingency we do not know. There can be no doubt that Andry has visibly and continuously "occupied" the land in the meaning of that word as applied to possession from and after the year 1893: Civ. Code, 3426, 3433, 3442 et seq. The "occupancy" of the same by the son, Seraphin Andry, was the "possession" and "occupancy" of his father, and the latter's own daily cultivation of the land gave outward signs of his nonabandonment. The right of homestead exemption is in this state a constitutional right, and the terms by which it is granted should not be narrowed by either the legislature or the courts.

While we think that the object of the granting of the right was the keeping of families together in a "home," we should not give undue prominence to the mere place where the family should be together, and lose sight of the object equally had in view of furnishing the head of the family with the means and instrumentalities by which he could support it. Forfeitures are not favored by the law. The homestead right should be upheld, unless clearly shown to have been abandoned. Each case must stand on its own peculiar circumstances.

Appellee invokes the length of time during which Andry did not return to actually live on the place, but there was no particular reason for his doing so, as he was in as good a position for deriving the full benefit from the property as he would have been directly upon it.

Thompson, in his work on Homestead and Exemptions, section 272, recognizes that the length of time during which a removing owner may have absented himself is a circumstance by which his intent to abandon may be inferred, but he says: "Though the number of months or years to which the absence of the party may be prolonged, ³⁶¹ without working a forfeiture of his rights, has frequently been considered in connection with other facts, time alone would be one of the most

uncertain and untrustworthy indicia by which the question of the permanency or temporary character of the abandonment could be determined. To hold the homestead right dependent upon continued personal occupation of the premises claimed, would be to declare the prime condition of the exemption to be occupation of the premises as a sort of prison rather than a house, to secure to the family certain pecuniary rights in consideration of their surrender of personal liberty. To restrict privileges of the owner of homestead property to a specific number of months or years during which he might absent himself from home, without losing the benefit of the homestead law, would be merely to extend the limits of the prison without changing its character as a place of confinement."

Says Dillon, J., in a case elsewhere cited: "How long an absence will forfeit the right depends upon the circumstances. If a man, for example, should lock up his homestead or even rent it and go to Europe on a tour of pleasure, or for any other temporary absence, clearly intending to return and resume possession of the homestead, it seems clear that even five years' absence would not, certainly as respects general creditors, work a forfeiture of the homestead right." And in another part of the same opinion the learned judge says: "That prolonged absence would ordinarily justify the conclusion of abandonment but this may be rebutted and explained where third persons have not been actually misled."

In *Cabeen v. Mulligan*, 37 Ill. 230, 87 Am. Dec. 247, the court said: "It would be manifestly unjust to hold, where the absence was prolonged indefinitely by sickness or other misfortune, that the length of time of the enforced absence should seriously affect the question of abandonment." We may say here in the case before us, that the district judge should have permitted the plaintiff in injunction to show why the house upon the property which had been destroyed had not been replaced. As the seizing creditor was basing her right upon a forfeiture of the homestead right, plaintiff was entitled to show any fact which would go to negative the theory of abandonment; the question of "residence" under the circumstances of this case was a mere "evidential" fact.

The only remaining question is as to whether the seised debtor has anyone dependent upon him for support. The daughter shown to be living with him is shown to be eighteen years of age, strong and able ³⁶² to work—actually doing the washing for her father. There is no doubt as to her ability

to leave her father and support herself by hiring herself out, but her father has the legal right to command her services, nor is there any legal right to force her to hire out her services before reaching majority. The father is legally charged with the duty of supporting her until she should become of age. There is no direct testimony to the fact that he actually supports her, but as he is shown to earn his own living, and she lives with him, we must presume that he has continued to perform the duty which the law imposes upon him. We think the daughter is legally dependent upon him for support.

For the reasons assigned, it is ordered, adjudged, and decreed that the judgment of the district court appealed from be, and the same is hereby, annulled, avoided, and reversed, and it is now ordered, adjudged, and decreed that the seizure herein made by the defendant in injunction be set aside without prejudice to any rights which he may have at some future time to seize said property on execution of his judgment. Costs of the district court and of this court to be borne by the defendant in injunction—appellee herein.

Rehearing refused.

Blanchard, J., dissents, holding that defendant had lost the homestead right by long-continued nonusage of the property as a place of residence.

A Homestead is not Abandoned by a temporary absence therefrom with the intention of returning: *Lynn v. Sentel*, 183 Ill. 382, 75 Am. St. Rep. 110, 55 N. E. 838; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019; *Bunker v. Coons*, 21 Utah, 164, 81 Am. St. Rep. 680, 60 Pac. 549; *Edwards v. Reid*, 39 Neb. 645, 42 Am. St. Rep. 607, 58 N. W. 202.

A Homestead Right is not Lost by the death, marriage, or removal of some of the members of the family: *Kessler v. Draub*, 52 Tex. 575, 36 Am. Rep. 727; *White Sewing Machine Co. v. Wooster*, 66 Ark. 382, 74 Am. St. Rep. 100, 50 S. W. 1000; *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575, and cross-reference note thereto, 17 S. W. 148; *Martin v. Harrington*, 73 Vt. 193, post, p. 704, 50 Atl. 1074.

Homestead—Head of Family.—A man living with his dependent child or children is entitled to a homestead as the head of a family: See the monographic notes to *Wade v. Jones*, 61 Am. Dec. 590; *Wike v. Garner*, 70 Am. St. Rep. 109. So is a man living with and maintaining his mother: *Bunker v. Coons*, 21 Utah, 164, 81 Am. St. Rep. 680, 60 Pac. 549.

MARTINEZ v. BERNHARD.

[106 La. 368, 30 South. 901.]

DOGS.—LIABILITY FOR INJURY BY.—The owner of a peaceable dog of gentle and kind disposition is not liable in damages merely because the dog bites a person. Without some fault on the part of the owner, liability does not arise. (p. 306.)

DOGS.—THE HAIR OF THE DOG is not an antidote for his bite, and for injuries due to using it as such antidote his owner is not answerable. (p. 307.)

DOGS.—THE BITE OF A DOG is not ground for damages against his owner if the death of the person bitten is traced to another cause. (pp. 307, 308.)

A. E. and O. S. Livaudais, for the appellants.

H. C. Cage and G. C. Preot, for the appellee.

³⁶⁸ BREAU, J. Plaintiffs sue for damages. Charles Martinez, the father of plaintiffs, was, on the eighth day of July, 1899, bitten by a dog ³⁶⁹ belonging to Michel Bernhard, the defendant. On the seventeenth day of August following Charles Martinez died.

Plaintiffs charge that defendant owned for his own use and pleasure a vicious and ferocious dog, and allowed it to run at large, although defendant knew that he was vicious and ferocious; that while their father was passing on one of the public highways of the city of New Orleans, he was attacked by this vicious animal and several times bitten and maimed by him; that the accident was owing to the neglect of defendant in allowing this dog to range at large; that the venomous and virulent character of the wound inflicted upon the body of the father was the cause of his death.

The defendant in his answer controverts plaintiffs' averments, and denies that he is liable in damages. Plaintiffs' demand was rejected in the district court, and they prosecute this appeal from the judgment.

We have not found, after carefully reading the testimony, that the animal was vicious and dangerous. It was not of a savage and blood-thirsty breed, addicted to acts of cruelty such as have brought the pure bloodhound into ill-repute. It was, we are informed by the testimony, a rabbit-dog, and had never before attempted to bite anyone. He was, at the time, in front of the store kept by the defendant.

A peaceable dog may rightfully be in front of the store of its owner. At any rate, an owner cannot well be charged with the neglect if his dog, which has never been known to be otherwise than gentle and kind, finds its way to the sidewalk in front of his place of business. The owner, it is true, is liable for damages caused by his animal, but to render him liable, it is necessary to prove that he is in some way negligent, or that he did not prevent the injury, where it was reasonably to be expected that he should have prevented it. Only the slightest fault, it is true, is sufficient to render the owner liable. Here the testimony has not fastened even the slightest blame upon the defendant. He was the owner of a domestic animal that was in front of his store, and, while there, bit the deceased. Upon this showing, plaintiffs are not entitled to a judgment.

The decisions of this court have always found that the owner was in some way at fault in cases in which damages were allowed: *Montgomery v. Koester*, 35 La. Ann. 1091, 48 Am. Rep. 253; *McGuire v. Ringrose*, 41 La. Ann. 1029, 6 South. 895. In *Delisle v. Bourriaque*, 105 La. 84, 29 South. 731, the court said that there is no responsibility when there is no fault.

370 "La jurisprudence francaise est dans le meme sens. Il a ete juge par la cour de Paris que le proprietaire d'un animal ne saurait etre declare responsable du dommage lorsqu'il n'a commis aucune espece de negligence, et qu'il n'a pu ni prevoir ni empecher l'accident dommageable": 20 Laurent, 675.

While the least act of negligence should be enough to hold one liable who owns a dog, yet it must appear that there was some negligence, however slight. This brings us to the question as to whether the death of Mr. Martinez was the natural result of the injury inflicted by the dog.

The two physicians who examined the wound pronounced it slight. One of the physicians was called to see Mr. Martinez on the thirteenth day of July. He found, he said, "two or three little marks on his leg, apparently not much, and I gave him a simple little application. Two or three days afterward I saw him and his leg was doing apparently nicely." This physician further says: "A few days afterward I noticed that he had erysipelas around the wound and down his leg. The erysipelas extended up and down his leg, invaded the wound and developed other wounds." We understand that the physicians concur in the statement that the bite of the dog was not the cause of the death. Septicaemia, they testified, was the cause of death, and they did not trace the cause of the poisoned

condition of the blood to the slight wound. It appears that the daughter of the deceased, one of the plaintiffs, obtained from the owner of the dog a small bunch of his hair, and conceived the idea that it would soothe the wound and cause it to heal. She put this hair on the scratches inflicted by the dog, carrying out the old saw that the hair of the dog is an antidote for the bite. She, after having put on the hair, applied a piece of salt meat over the hair. The hair and the salt meat remained on the wound for about a week, at the end of which week erysipelas developed itself; the application was removed and the physician sent for.

In answer to the question, "Doctor, what do you think of the advisability of putting dog hair on a wound?" the doctor said: "Very injurious and absolutely certain to carry germs and disease into the wound, and produce any sort of trouble like lockjaw, erysipelas, or, in fact, many other diseases." In answer to the question, "Did you connect the death of the patient with the dog bite, except remotely?" the witness said, ³⁷¹ "No, sir, I did not. It was due directly to septicaemia," and we understand that this witness, who was the regular attending physician, did not charge the septicaemia to the wound, which he said was slight. The other physician called, and who had consultation with the attending physician, stated that the wound was slight, and testified that unless a dog was kept perfectly clean and constantly washed, his hair would have aseptic tendency, and the probable effect of placing the aseptic hair in a wound would be to cause septicaemia.

We have quoted at more than usual length from the testimony of these physicians, for we consider their testimony of importance in determining the issue. The medical testimony entirely fails to find in the bite of the animal the legal and proximate cause of the death. It was not the true *causa causans*, the efficient cause attaching responsibility on the defendant. It was shown that the original injury was aggravated by the imprudent treatment of the daughter, and that the wound was slight and would not have caused death if it had not been for the mistaken application made as before stated. These physicians have testified regarding the cause of death as a separate and independent cause. In other words, they, in substance, testified that if it had not been for the treatment just mentioned, the man would not have died of the slight wounds received. In the presence of this uncontra-

dicted testimony, there can be but one conclusion arrived at, and that is, the defendant is not liable.

The court, therefore, orders, adjudges, and decrees that the judgment appealed from be affirmed.

Dogs—Owner's Liability.—The owner of a dog, having notice, either actual or constructive, of the animal's viciousness, is liable for injuries inflicted by him: *Robinson v. Marino*, 3 Wash. 434, 23 Am. St. Rep. 50, 28 Pac. 752; *Strouse v. Leipf*, 101 Ala. 433, 46 Am. St. Rep. 122, 14 South. 667; *Plummer v. Ricker*, 71 Vt. 114, 76 Am. St. Rep. 757, and cross-reference note thereto, 41 Atl. 1045. And it is held in *Crowley v. Groomell*, 73 Vt. 45, post, p. 690, 50 Atl. 546, that a cross and savage disposition on the part of a dog is not necessary in order to impose liability on its owner for its assault, but that a mischievous propensity is enough.

STATE v. NORTH AMERICAN LAND AND TIMBER CO.

[106 La. 621, 31 South. 172.]

CORPORATIONS, FOREIGN—RIGHT TO DO BUSINESS.—A foreign corporation not engaged in commerce, or in the service of the United States, can do business in the state only upon the conditions imposed by its laws. (p. 313.)

CORPORATIONS, FOREIGN—JURISDICTION—SERVICE ON AGENT.—If a foreign corporation has complied with the law of the state by establishing an office therein and designating an agent upon whom process may be served, service upon such agent confers jurisdiction to hear and determine the case, irrespective of the citizenship of the plaintiff or the subject matter of the controversy. (pp 315, 316.)

CORPORATIONS, FOREIGN—JURISDICTION.—If a foreign corporation accedes to the provisions of the state law as to service, and accepts them as a condition upon which it may do business in the state, the court, by such service, acquires complete and perfect jurisdiction, and may render judgment in personam against the corporation which is entitled to full faith and credit in other jurisdictions. (p. 317.)

COMPLETE JURISDICTION INCLUDES not only the power to hear and determine the cause, but also power to enforce the judgment; and courts usually decline to entertain, or attempt to exercise, jurisdiction intended to be complete, if it fails to confer power to enforce the judgment which may be rendered. (p. 318.)

CORPORATIONS, FOREIGN—JURISDICTION OVER.—While state courts will not ordinarily entertain suits involving the exercise of visitatorial powers over foreign corporations, nor undertake to regulate their internal management, yet if, in a particular case, the court acquires jurisdiction and is not only able to hear and determine, but also to enforce its judgment so as to do complete justice, it will exercise such jurisdiction, although the result may be to regulate the internal affairs of the corporation. (p. 320.)

CORPORATIONS, FOREIGN—JURISDICTION—INSPECTION OF BOOKS—MANDAMUS.—If a foreign corporation doing business within the state fails to keep therein its books as required by law, and its officer having the custody of such books is not within the reach of state process, mandamus will not lie to compel the inspection of such books, but if there are other books within the state and in the custody of the agent of the corporation therein, mandamus may issue in favor of a resident or nonresident stockholder, to compel permission to inspect such books. (pp. 321, 324.)

CORPORATIONS, FOREIGN—INSPECTION OF BOOKS—MANDAMUS.—The right of a stockholder in a foreign corporation to compel by mandamus permission to inspect its books is not affected by a provision in its charter or by-laws that differences between the corporation and its stockholders shall be submitted to arbitration. (p. 322.)

T. T. Taylor and Cline & Cline, for the appellant.

Pujo & Moss, for the appellee.

622 MONROE, J. The relator, claiming as a stockholder, seeks to enforce by mandamus his right to inspect the books of the defendant corporation. To the proceeding originally filed an exception was interposed to the effect that it was directed against the manager of the company alone, and that there had been no prayer for citation and no citation of the company, and, upon appeal to this court, the exception was maintained, and the case remanded for "amendment of the application . . . and in order that legal service may [might] be made of the order or writ calling the defendant into court," the costs of the appeal to be paid by the relator and those of the lower court to await final judgment: *State v. North American Land etc. Co.*, 105 La. 379, 29 South. 910.

Thereafter the original petition was amended, and both petitions, taken together, allege, in substance: That relator resides in the state of Kansas, and that respondent is an English corporation here represented by Arthur V. Eastman, **623** who has been designated, agreeably to the law of this state, as the person upon whom process may be served, and who has established, at Lake Charles, in the parish of Calcasieu, an office in which is kept "all the books of account, of sales of land, and all other transactions of said company, and all other books of every description, and all accounts necessary to be kept for the information of said company, its stockholders and directors, and for the proper conduct and management of its business in this state"; that the relator is the owner of stock in said company of the par value of about one hundred and ninety thousand dollars, but by reason of a cabal between the stockholders

and directors in England, is deprived of all voice, management and control in the direction of its affairs; and that, in order that he may be informed of its present condition and past transactions, and may so exercise his rights as to prevent mismanagement, correct abuses, extravagance and waste, and protect himself from irreparable loss and injury, it is necessary that he should be allowed to inspect all the books, accounts, papers, and correspondence of said company, and that application to that effect was made by his duly authorized agent and denied by the representative of the company. "Wherefore relator prays the court to order the issuance of an alternative writ of mandamus, commanding the said North American Land and Timber Company, Limited, to appear and show cause why the relator should not be permitted to examine and inspect the record of the amount of capital stock subscribed, and of transfers thereof, the names of the owners of stock, the amounts owned by them, respectively, the amount of stock paid and by whom, the amount of its assets and liabilities, together with all other books, papers, letters received and copies of answers thereto kept, used, received, sent, and exchanged in the transaction of business by said respondent company," etc.

To this petition and the order to show cause made thereon the company excepts and pleads as follows: "That respondent has not in its possession in its office at Lake Charles any of the books enumerated in article 273 of the constitution of 1898, or in relator's application, but that such books and all its other corporate records are kept in its office at London, England, the legal domicile created by the charter to which relator was one of the original subscribers; that the contract existing between relator and respondent by reason of relator's being a stockholder in said company was entered into in England, a foreign country; that relator is ⁶²⁴ also a nonresident of the state of Louisiana, for which reason your honorable court has no visitatorial power of the organization of respondent company, its corporate functions, by-laws, or over the relations existing between respondent and its members, and their respective rights and obligations arising under the law of said company's creation, for which cause your said honorable court is without jurisdiction of the subject matter of the suit, and the remedy sought is beyond the reach of the court, and not within the sovereign power of the state from which this court has its authority; that act 149 of 1890 does not subject the

company to the jurisdiction of this court for any cause of action, but merely requires the appointment of an agent upon whom service of process can be made, or in other words, it was not the intention of said act to give the court jurisdiction over causes of action accruing out of the state against a corporation created and existing beyond the limits of the state, and your honorable court is without jurisdiction *ratione materiae*, unless the cause of action existed against the company independently of the mere fact of its being represented by an agent within the state."

Reserving the benefit of this exception, the respondent further pleads in substance: That since the filing of the original petition herein and the judgment thereon the relator, through the instrumentality of a receiver appointed by the circuit court of the United States for the western district of Louisiana, and through an expert, acting as his agent, obtained possession of all the books kept at its office in Lake Charles, inspected the same, and made copious extracts and memoranda therefrom, and is not entitled to further investigation, and that the present application is made for no other purpose than to harass and annoy this respondent. That respondent was organized in 1882, under the law of England, and that relator was one of its organizers and signers of its charter. That article 126 of said charter provides that "the directors shall, from time to time, determine whether or to what extent and at what time and place, and under what condition and regulations the accounts and books of the company, or any of them, shall be open to the inspection of the members, and no member shall have the right of inspecting any account or book or document of the company except as conferred by statute, or authorized by the directors, or by resolution of the company in general meeting." That relator does not allege that he has ⁶²⁵ been granted the right claimed by statute or otherwise, as contemplated by said article, the provisions of which are binding upon him as a matter of contract. That article 147 of said charter provides that "if any dispute shall arise between the company and any of its members, or any of the officers, directors, or creditors, as such, touching any matter within the purview of these presents, the matter in dispute or difference shall be submitted for final decision to two arbitrators or their umpire, pursuant in all respects to the provisions in that behalf of the common-law procedure act of 1854, or any then existing statutory modification thereof, and this

article shall be deemed to be a submission by all the parties above referred to to arbitration, and may be made by any of the parties a rule of any division of the high court of justice; and the award of such arbitrators or their umpire shall be absolutely binding on all of said parties." And that the relator is bound thereby with respect to the matters involved in this proceeding.

And reserving the benefit of said plea, respondent denies generally the allegations of relator's petition, and avers that the only books in its possession in this state are such as are necessary to be kept by its agent, Austin V. Eastman, and that such books are not, in the eye of the law, corporate books and records, all of which latter are kept at its home office in London.

It appears from the evidence that the respondent company was organized in England in 1882, under the authority of certain acts of the British parliament, and that the "memorandum of association," as also what are called "articles of association," constituting, together, its charter, were signed by the relator, with other subscribers. The declared purposes for which the company is established are multifarious, including the "buying and selling of lands in the United States of America or elsewhere," the idea conveyed being that whilst operations may be conducted elsewhere, this country was the field immediately in view. The capital stock of the company was fixed at five hundred thousand pounds, and subsequently reduced to three hundred and fifty thousand pounds, of which the relator appears to be the owner of twenty-eight and one-fourth per cent. Shortly after its establishment the company appointed the relator its agent and general representative in this country, and he held that position until 1896, when the present incumbent was appointed in his stead. In the meanwhile, though vast tracts of land had been purchased, and the company was registered as doing business and as having an office and an agent upon ⁶²⁶ whom process might be served in this state, such of its books as are particularly specified in relator's petition have been kept in England, and have never been brought within the state of Louisiana. Being asked his reason for wishing to inspect said books, relator testifying as a witness in his own behalf, said: "I desire to inspect the books to see which land of the North American Land and Timber Company has been sold, and at what price it was sold, and upon what terms of payment. I have received the impression, from common

report, that a very large portion of the land of the company that is susceptible of cultivation has been sold. . . . I want to inform myself of the exact situation, because I understand several hundred thousand dollars' worth of land has been sold during the last four or five years, and during all of this time I have been paid, in dividends upon my stock, only two and one-half per cent. I want to ascertain, if possible, where this money is that has been received for land. On the day I arrived in Lake Charles I was informed and read in the newspapers that this Mr. Eastman had sold more than one hundred thousand acres of land, and when inquiry was made of him as to the terms and conditions of that sale, his answer was: 'I have no information to give out.' I want to know upon what terms and conditions that hundred thousand acres of land was sold, because my interest in that land amounts to twenty-eight and one-quarter per cent." After the case was remanded by this court, in May of the present year, a receiver was appointed to the respondent company by the circuit court of the United States, and, during his administration, which lasted until the decree appointing him was reversed on appeal, he afforded access to the books which had come into his possession to an agent whom the relator had selected to examine them, and who reported the result of his examination to his principal. This was not done with the consent of the respondent, however, and the question of the right of the relator to make such examination remains to be determined, and has been and is persistently denied.

As the respondent corporation is a mere creation of foreign law, and is engaged neither in commerce nor in the service of the federal government it was within the power of the state of Louisiana to exclude it from her territory, or to admit it upon such conditions, reasonable or unreasonable, as she thought proper to impose. In the ⁶²⁷ absence of special legislation, the respondent was at liberty to enter the state for the purposes of its business, as a matter of comity, and subject to no other conditions than that it would conform to the public policy of the state as declared in her general law and the decisions of her courts. But the state having imposed certain conditions by both her fundamental and statute law, the respondent must be presumed to have accepted, and did in part specifically accept, them when it engaged in business within her territory, and is bound by them accordingly. Articles 245 of the constitution of 1879 and 273 of the constitution

of 1898, respectively, provided, and now provide, that: "Every corporation organized or doing business in this state shall have and maintain a public office or place in this state for the transaction of its business, where transfers of stock shall be made, and where shall be kept, for public inspection, books in which shall be recorded the amount of the capital stock subscribed, the names of the owners of stock, the amounts owned by them, respectively, with the date of transfer, the amount of its assets and liabilities, and the names and places of residence of its officers."

Articles 236 of the constitution of 1879 and 264 of the present constitution, respectively, provided, and now provide, that: "No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in this state upon whom process may be served."

Article 245 of the constitution of 1879 has been held to require no legislative action to give it effect: *State v. New Orleans Gas Light Co.*, 49 La. Ann. 1559, 22 South. 815.

Act 149 of 1890, entitled "An act to carry into effect article 236 of the constitution of 1879," reads: "Section 1. . . . That it shall be the duty of all corporations domiciled out of the state, doing business in this state, excepting mercantile corporations, to file in the office of the Secretary of State a declaration of the place or locality of its domicile, together with the name of its agent or officer in the state representing said corporation, upon whom service of process may be made. Section 2. . . . Whenever any such corporation shall do any business of any nature whatsoever in this state without having complied with the requirements of section 1 of this act, it may be sued upon any cause of action in the parish where the right or cause of action arose, and service of process may be made upon the person or persons, firm or company transacting such business for such corporation, ⁶²⁸ and each person or persons, firm or corporation shall be deemed the agent of the corporation upon whom service can be made."

The respondent has accepted and has complied with the conditions thus imposed, in that it has maintained an office in this state and has designated a person upon whom process may be served, but it has not complied with them, in that it has failed to keep in such office the books required to be kept there, and it claims that service of process upon the agent whom it has designated to receive the same confers upon the courts issuing such process jurisdiction only in a certain class of cases.

Whether we assume that laws are enacted exclusively in the interest and for the protection of the people who enact and are to be governed by them, or that they are also intended in a spirit of interstate and international comity, to prevent the territory throughout which they may be enforced from being used as a field of operations for the infliction of injury upon others, no good reason suggests itself why foreign corporations, establishing permanent agencies in a state, should not be required to furnish the same facilities for the obtention of information as to their status and for the obtention of legal redress as the corporations established by such state. And it was probably because it was thought that no such reason exists that the framers of the last preceding and present constitutions of Louisiana, the one adopted after nearly twenty years' experience of the other, incorporated in these instruments the articles which have been quoted, and which apply in identical terms to both foreign and domestic corporations. It will be observed that the requirement upon the subject of books does not demand original books of entry, save such as are necessary in transferring stock, but merely exacts that "books" containing certain information shall be kept in the office of every corporation organized or doing business in this state, and that such books shall be open for public inspection. If the corporation is organized here, its original books will, of course, meet the requirement. If it is organized elsewhere, and is doing business here, the requirement may be complied with by its keeping books containing the necessary information obtained from the original books at the home office, through the mails, or otherwise. It may be considered settled jurisprudence in this state that such books are not open to the inspection of persons without interest, or to the unreasonable inspection of persons who are interested; but whatever may be the method adopted for that purpose, the ⁶²⁹ books must be kept as required, or the business of the corporation is illegally conducted. When, therefore, the respondent avers and shows that it has been engaged in business in Louisiana for more than seventeen years, but that the books required by the constitution of the state to be kept in its office have never been, and are not now, so kept, it avers and shows that for more than seventeen years it has conducted, and is now conducting, such business in violation of our fundamental law. What the penalty may be, and at whose instance and in what manner it may be enforced, need not now be considered.

The plea to jurisdiction is based on the proposition that the constitutional and statutory law which has been quoted was intended to confer upon the state courts jurisdiction only in suits brought by citizens of Louisiana against foreign corporations engaged in business here, upon contracts entered into or causes of action arising in this state, and that service of process on the agents of such corporations, designated in compliance with that law, should not be held to confer jurisdiction in other suits, and without regard to the citizenship of the plaintiffs or the subject matter or place of origin of the controversies. Proceeding to the consideration of this proposition, we find nothing in the law in question to warrant the conclusion that it was the intention to discriminate in favor of the citizens of Louisiana in the matter of bringing suits against foreign corporations, the discrimination made by the second section of the statute relating only to the place of origin of the right or cause of action, and operating as favorably to citizens of other states and countries as to citizens of this state. If, therefore, the present action would lie in favor of a citizen of Louisiana, it will lie in favor of the nonresident relator; and all the more is this true if the relator is a citizen of the state of Kansas, since the constitution of the United States in such case secures to him, in Louisiana, all the rights, privileges, and immunities which the state of Louisiana accords to her own citizens. Nor do we find anything in that law whereby the jurisdiction acquired by service of process upon an agent authorized by a foreign corporation to receive the same is limited to any particular class of cases.

The present doctrine upon that subject is thus stated by a recent writer: "In all the states, statutory methods are now provided for the service of process upon foreign corporations which are doing business in the state. Where a corporation accedes to such provisions, as to service, and accepts them as a condition upon which it may do ⁶³⁰ business in the state, the court acquires complete and perfect jurisdiction over it, and may render a judgment in personam against it, and such a judgment is entitled to full faith and credit in other jurisdictions": Elliott on Private Corporations, 2d ed., 201.

This doctrine has long been approved in Massachusetts, where it has been held that "a nonresident may sue a foreign insurance company, which does business in that state, on a contract made in another state, where the subject matter of the contract is also situated, although the only service made is on

the insurance commissioner, whom all foreign insurance companies are required to appoint as their attorney for the service of process": Taylor on Private Corporations, 392; citing *Johnston v. Trade Ins. Co.*, 132 Mass. 432; *Wilson v. Fire Alarm Co.*, 149 Mass. 24, 20 N. E. 318.

The English courts have gone further, and now hold that where a foreign corporation establishes a permanent branch agency in England, it may be sued through the agent in charge of such branch in the same manner as domestic corporation, whether the agent is specially authorized to accept citation or not. And Morawetz says upon this subject: "However, if a corporation open an office or habitually transacts business in a foreign state, the head officer there must be deemed an agent of the company for the purpose of receiving service of process, and, under these circumstances, service upon the officer is binding upon the company itself": Morawetz on Private Corporations, 1st ed., 523; citing *Newby v. Von Oppen & Colts etc. Mfg. Co.*, L. R. 7 Q. B. 293, 296. See, also, 6 Thompson's Commentaries on Law of Corporations, par. 7990.

The court of appeals of New York, sustaining the provisions of the Code of Civil Procedure to that effect, has gone still further, and holds that a citizen of that state may sue a foreign corporation upon any cause of action, no matter where originating, and no matter whether the corporation has engaged in business or has appointed an agent to receive service of process in the state or not, service upon one of its officers found within the state, whether there upon his own business or otherwise, being considered sufficient to bring the corporation into court, provided the service upon such officer would have been sufficient at the domicile of the corporation: *Pope v. Terre Haute Car Mfg. Co.*, 87 N. Y. 137.

It is not necessary, nor would we be disposed to adopt the extreme ⁶³¹ view last above referred to. On the contrary, we might hold that the jurisdiction acquired by service of process on respondent's agent in this state is confined to cases in which the cause of action arises here, and, nevertheless, maintain the jurisdiction so acquired in the instant case. For, whilst the relator's right—if he has any—to inspect the respondent's books may spring from the contract made in England, the cause of action disclosed in his petition consists of the refusal of the respondent's agent here to permit him to exercise that right.

Jurisdiction, however, when considered in connection with

the exercise of judicial functions, "includes the power to compel a person to appear and answer a complaint or to punish him for not doing so; the power to take property in dispute into the custody of the law; the power to compel the production of evidence and hear the contention of parties; the power to determine the question of right between parties and to enforce the determination": Century Dictionary, verbo, "Jurisdiction." And where there is a lack of power in either of the directions mentioned, whether because intentionally withheld or because of the incapacity of the grantor to confer it, the jurisdiction may be said to be limited in the one case, and incomplete or inadequate in the other. Thus, the power to hear may be granted, and the power to determine withheld, or the power to hear and determine may be granted and the power to enforce the determination withheld, or the power to hear, determine, and enforce may be conferred, but restricted to particular litigants or subjects, and the jurisdiction may be properly exercised to the limit prescribed with the effect of fully accomplishing the purpose for which it is conferred. But where, from the terms of the grant, it is evidently the intention to confer jurisdiction without limit as to persons or subject matter, or to confer complete jurisdiction, within certain limits, and the exercise of all the power intended to be conferred is necessary in order that the purposes of the grant may be accomplished, but it happens that the grant falls short, in an essential particular, by reason of want of power in the grantor, it follows that the jurisdiction, as conferred, is incomplete or inadequate, and the question arises whether, if, in a particular case, the purposes of the grant cannot thereby be accomplished, such jurisdiction should be exercised at all.

"It is a fundamental principle of the law of mandamus," says Mr. High, "that the writ will never be granted in cases where, if issued, it would prove unavailing, and whenever it is apparent to the court that ⁶³² the object sought is impossible of attainment, either through want of power on the part of the person against whom the extraordinary jurisdiction of the court is invoked, or for other sufficient causes, or that the granting of the writ must necessarily be fruitless, the court will refuse to interfere. So, if it is apparent that the writ, if granted, cannot be enforced by the court, relief will be withheld, since the courts are adverse to exercising their extraordinary jurisdiction in cases where their authority cannot be vindicated by the enforcement of process. Nor will man-

damus be allowed unless the act or duty whose enforcement is sought is legally possible at the time; and it is, therefore, a sufficient return to an alternative mandamus that the respondent has no power to do the act required": High on Extraordinary Legal Remedies, sec. 14.

"A mandamus will not issue to compel a public officer to perform a ministerial duty when the evidence shows that the performance of that duty by him is a physical impossibility, or that his ability to carry out the mandates of the court depends upon the co-operative action of a third person who is not before the court": State v. Cavanac, 30 La. Ann. 237.

"The service of the writ of mandamus must be upon the special officer or officers of the municipal corporation who are legally required to do the thing demanded": State v. Shreveport, 29 La. Ann. 658; State v. Judge, 38 La. Ann. 43, 58 Am. Rep. 158.

"Where a peremptory mandamus is directed against a corporation, punishment is to be inflicted on the officers of the corporation who, under the charter and by-laws, have power to perform the act commanded by the writ": 13 Ency. Pl. & Pr. 813.

Hence it follows that whilst a court may have jurisdiction to hear and determine a cause against a corporation, and to render judgment commanding it to perform a particular act, and may also have such power for the enforcement of its judgment as its grantor can confer, nevertheless, if the corporation has its domicile in a foreign state or country, and the particular officers to whom alone the necessary compulsion can be applied are beyond the reach of its process, the jurisdiction, as a whole, falls short; and as the court will be powerless to enforce obedience, the judgment will not be rendered. This consideration, and a further consideration founded on public policy, we understand to be at the base of the well-established jurisprudence to the effect that the courts of one state will not ordinarily exercise ⁶³³ visitorial power over corporations established under the laws of another state, and will not, as a rule, entertain suits having in view the regulation of the internal affairs of such corporations. Mr. Taylor says upon this subject: "As the courts of a state will enforce contracts at the suit of a foreign corporation, so they will entertain actions against it. But the subject matter of the suit must not be such that the court will decline to assume jurisdiction, as, for instance, on account of its inability to do complete justice in the matter.

"Courts will not, however, determine matters relating to the internal management of foreign corporations arising between one set of shareholders and persons claiming to be the officers as well as shareholders of the corporation. But the legal relations between a corporation and its shareholders are to be determined by the law of the home state, and, accordingly, a state will recognize and apply a statute of a home state giving a corporation lien on its share for debts due to it from the shareholders": Citing *Wilkins v. Thorne*, 60 Md. 263; *North State Copper etc. Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Bishop v. Globe Co.*, 135 Mass. 132; *Taylor on Private Corporations*, 3d ed., 292. In another text-book we find the doctrine and the reasons therefor stated as follows: "As a general rule, actions brought by stockholders, generally, in equity, to restrain or redress frauds or breaches of trust committed by the directors or officers of the corporation, or by a majority of its stockholders in the management of its business and property, can only be brought in courts of the state under whose laws the corporation was created. This rule rests partly on jurisdictional grounds and partly on grounds of policy and expediency. It is indispensable in such an action that the corporation should be made a party in its corporate name and character. This reason alone, in many cases, drives the stockholder to the forum of the state of the corporation, because service of process cannot be had upon the corporation in other jurisdictions. It also rests upon the further consideration that in many cases, by reason of the fact of the property of the corporation being situated out of the state, it will be impossible for the court to effectuate its judgment, if it renders any. But it is obvious that many cases will arise where these reasons will not be controlling. Take, for instance, such a case as that stated in a preceding section, where a manufacturing corporation migrated with its entire business, corporate ⁶³⁴ books and personnel, from the state of its creation into another state, and there did all its business and had all its corporate meetings. . . .

"We accordingly find judicial opinions which more or less modify the general rule of jurisdiction above stated. One of them is to the effect that though such an action must, in general, be prosecuted in the state under whose laws the corporation has been created, yet injunctions and other auxiliary remedies may be had in the courts of other states": *Moore v.*

Swiss Valley Min. Co., 104 N. C. 534, 10 S. E. 769; 6 Thompson's Commentaries on Law of Corporations, 8011.

The courts are not altogether agreed as to what acts of a corporation relate to its internal management, and in Maryland it has been held "that, where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agent, the board of directors, that then such action is the management of the internal affairs of the corporation; and, in case of a foreign corporation, our courts will not take jurisdiction."

This is, perhaps, a correct statement of the minor premise and conclusion of a syllogism, in which, however, the major premise is neither established nor conceded, for, whether a court should exercise jurisdiction in a particular case against a foreign corporation is, in our opinion, a question to be determined with reference rather to its power to enforce any decree that it may find it necessary to render, in order to do complete justice, than with reference to the possible effect of the suit upon the internal management of the corporation. If, as in the case referred to by Mr. Thompson, a corporation succeeds in migrating into another state than that of its creation, and in carrying there its officers and property, and holds its corporate meetings and transacts its corporate business within the jurisdiction of the courts of such other state, so that any judgment rendered by such courts concerning such business can be completely enforced, we know of no reason why controversies as to the regulation of that business, whether arising among the members of the corporation or between them and third persons, should not be determined by these courts. Nor, if books showing the business done by a corporation in a state other than that of its domicile and origin are kept in such other state in the custody and under the control of the officer conducting such business, does any reason suggest itself why a shareholder, having the right to inspect ⁶³⁵ these books, should be driven out of the jurisdiction in which they are kept for the vindication of that right.

Applying these conclusions to the instant case, we are of opinion that under the contract whereby the relator became a shareholder in the respondent corporation the right is accorded him to inspect such books as the law of Louisiana requires foreign corporations, doing business here, to keep open for in-

spection; but as the corporation has not complied with the law, and as neither the books nor the officers having the custody and control of them are within reach of the process of the courts of this state, he must seek the vindication of that right in some other jurisdiction.

We are further of opinion, however, that, as to the books, papers, letters received, and copies of answers thereto kept and used in the transaction of the business of the respondent, and in the custody or under the control of its agent at Lake Charles, the relator has made out a case which entitles him to relief. It is true that it is admissible under our laws for persons to submit to arbitration pending lawsuits or existing differences, but it is not admissible in England, where the contract from which the relator's right arises was made, nor do we think it would be admissible here for persons to stipulate, in advance, that in the event of differences arising in the future they will deny themselves the right to resort to the courts for their settlement. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, section 670, says upon this subject: "And where the stipulation, though not against the policy of the law, yet is an effort to divest the jurisdiction of the ordinary tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not, any more than a court of law, interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations if they were specifically enforced." This doctrine was approved by the supreme court of the United States in *Home Ins. Co. v. Morse*, 20 Wall. 445, from the opinion in which case we excerpt the following: "In *Scott v. Avery*, 5 H. L. Cas. 811, the lord chancellor says: 'There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first I need refer to was a case decided about a century ago': *Kill v. Hollister*, 1 Wils. 129. That case ⁶³⁶ was an action on a policy of insurance in which there was a clause that in case of any loss or dispute it should be referred to arbitration. It was decided there that an action would lie, although there had been no reference to arbitration. Then, after the lapse of half a century, there occurred a case before Lord Kenyon, and from the language that fell from that learned judge, many other cases had probably been de-

cided which are not reported. But in the time of Lord Kenyon occurred the case, which is considered the leading case on the subject, of *Thompson v. Charnock*, 8 Term Rep. 139." The case thus referred to related to an agreement, contained in a charter-party, to arbitrate differences which might arise, and it was held that it should not be enforced. In the case before us, the evidence shows that the respondent, Austin V. Eastman, manager, acted under instructions from his principal in refusing to allow the representative of the relator to inspect the books and papers in his possession relating to the respondent's business. The relator, therefore, had to choose between the alternatives of submitting to arbitration or appealing to the courts, and he chose the latter alternative, as he had the right to do. Counsel for respondent suggest, in their brief, that the evidence taken on the original hearing and contained in the transcript heretofore filed in this court was not reoffered on the second hearing, and hence that there is not sufficient evidence now before the court to authorize a decree in favor of the relator. We recognize the technical force of this suggestion, but we think that the case was tried upon the second hearing upon the theory that the evidence was in without being reoffered, and as we have it before us in the other transcript, we do not think that the interests of justice require that the case should be again remanded in order that such evidence should be again offered.

It may be remarked that, if it appeared that it was in the power of the relator to specify the books, papers, etc., which are in the possession of the respondent's agent in this state, we should hesitate to make any order concerning them without such specification, but the relator, who is interested to the extent of almost one-third in the business and property of the respondent, has been denied access to the books showing how that business and property are being managed, and he has no means of ascertaining in what particular books, papers, or records the respondent, through its agent, keeps that information, and to require him, specially, to designate such books, etc., would be to require an impossibility, and to concede the right of the respondent to deny him the information.

⁶³⁷ It may further be remarked that, if the inspection which the relator was enabled to make, after the institution of this proceeding, had been accorded by the respondent, it would have been tantamount to an admission that the suit was properly brought, and the relator would have been entitled to a judg-

ment as by confession, and we think that he is none the less entitled to a judgment because the inspection was accorded by the receiver, and he has been compelled to establish his right thereto over the opposition of the respondent; otherwise the issue between the relator and the respondent would be left undetermined.

For these reasons, it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of the relator, making peremptory the alternative writ of mandamus issued in this case in so far as to command the respondents, the North American Land and Timber Company, Limited, and Austin V. Eastman, its manager, to allow said relator to inspect such books, papers, letters, and copies of letters, relating to the business of said company, as may be in the possession or under the control of said manager, such inspection to be made within a reasonable time, and without impeding the business of the company or subjecting its officers to unnecessary inconveniences. It is further ordered that the respondent corporation pay the costs in both courts.

Foreign Corporations have no absolute right to recognition in the state. They may be admitted on such terms and conditions as the state may impose, or they may be excluded altogether: *State v. Schlitz Brew. Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638, 38 S. W. 85. In doing business in a state they must conform to its laws: *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519.

Jurisdiction of Foreign Corporations is considered at length in the note to *Abbeville etc. Co. v. Western etc. Co.*, 85 Am. St. Rep. 905-938. See page 938 of this note to the effect that a judgment against a foreign corporation upon service on its agent within the state is a valid and enforceable judgment in personam, and must be given effect as such in other states.

The Internal Management of a Foreign Corporation will not ordinarily be inquired into or controlled by the courts of a state: *Condon v. Mutual Reserve Assn.*, 89 Md. 99, 73 Am. St. Rep. 169, 42 Atl. 944.

The Right to Inspect Corporate Books on the part of a stockholder may be enforced by mandamus: *Johnson v. Langdon*, 135 Cal. 624, ante, p. 156, 67 Pac. 1050; *Stone v. Kellogg*, 165 Ill. 192, 56 Am. St. Rep. 240, 46 N. E. 222; *Ellsworth v. Dorwart*, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

UNITED STATES INVESTMENT CORPORATION v.
ULRICKSON.

[84 Minn. 14, 86 N. W. 613.]

INFANTS.—IN SO FAR AS A CONTRACT ON THE PART OF AN INFANT IS EXECUTORY, he may always interpose his infancy as a defense to an action for its enforcement. (p. 328.)

INFANTS—DISAFFIRMING MORTGAGE.—AN INFANT WHO VOLUNTARILY ASSUMES THE POSITION OF OWNER OF LAND, as the representative of his father, solely for the purpose of raising funds to free the land from debt, the only consideration for the conveyance to him being his agreement to execute a mortgage for that purpose, cannot, upon becoming of age, disaffirm the mortgage and retain the land discharged from its encumbrances. (p. 329.)

INFANTS—DISAFFIRMING MORTGAGE.—AN INFANT WHO IN GOOD FAITH assumes the ownership of land on the sole consideration that he execute a mortgage thereon for the purpose of raising money to free it from debt, cannot, after becoming of age, retain the land and disaffirm such mortgage, where all the money realized therefrom has been used to free the land from encumbrances. (pp. 329, 330.)

JUDGMENT—AMENDMENT.—PRIOR TO THE RETURN TO THE SUPREME COURT ON APPEAL, a trial court may amend its judgment in foreclosure so as to strike out all reference to a deficiency judgment, which had been included in the findings and judgment through inadvertence. (p. 330.)

Olson & Johnson and George Cudhie, for the appellant.

G. T. Christianson and James D. Shearer, for the respondent.

15 LEWIS, J. This is an action brought to foreclose a mortgage given to plaintiff's assignor on certain farm property in the counties of Renville and Kandiyohi.

At the time of the execution of the mortgage, defendant Ulrickson ¹⁶ was a minor, and immediately upon his becoming of age, prior to the commencement of this action, he disaffirmed the mortgage. Plaintiff's reply put in issue the facts found by the court, substantially as follows: 1. On October 21, 1895, Tideman Ulrickson, father of defendant, was the owner of certain lands situated in Renville county, and on that day conveyed the same, through a third party, to his son, Olaf J. T. Ulrickson, an older brother of defendant. On July 14, 1897, Tideman Ulrickson assigned to defendant a contract upon certain other lands in Kandiyohi county. On March 9, 1897, Olaf J. T. Ulrickson conveyed the lands in Renville county to his brother, the defendant. 2. The court found that the only consideration for the transfer and the conveyance of such lands from the father by assignment and by deed through the brother to defendant was the assumption and agreement by defendant to pay off certain liens and claims against the transferred property; and it was understood and agreed by and between the father, the son, Olaf J. T. Ulrickson, and the defendant, that the money should be obtained by means of a mortgage upon such premises by defendant for the purpose of paying off the liens and claims then existing against the property. 3. It was found that the liens and claims existing against the premises at the time they were so transferred consisted of an indebtedness to the state of Minnesota upon the land in Kandiyohi county of \$802.16, a lien of \$203.55 for building materials, a mortgage upon the lands in Renville county of \$1,235.61, and one to the Kandiyohi Bank in the sum of \$581, a judgment to A. H. Sperry of \$201.61, and taxes due the state, amounting to \$38.58, making a total of \$3,062.51. 4. On November 18, 1897, in pursuance of this agreement, the defendant, who was an unmarried man, executed and delivered to one Adam Hannah his promissory note for the sum of \$3,300, payable on January 1, 1903, and to secure the payment thereof at the same time executed and delivered a certain mortgage, with covenants of warranty, upon the premises so conveyed to him, which mortgage was recorded in Renville county on January 1, 1898, and in Kandiyohi county on January 8, 1898. 5. The court found further that at the time such loan was made the defendant, the Security Bank of Renville, was the agent for the mortgagee in conducting ¹⁷ negotiations with defendant Ulrickson for such loan, and agreed that, in case the loan from Hannah should prove insufficient for the

purpose of paying off the liens, it would advance him such further sum as might be needed to make up the deficiency; and that thereafter the defendant bank did loan defendant Ulrickson the sum of \$300, taking as security a second mortgage upon the premises. 6. That at the time of the execution of the mortgages the defendant Ulrickson was a minor, and did not reach his majority until April 7, 1899, but had the appearance of being a man about twenty-three years of age; and the father, in defendant's presence, represented him to the agent to be of lawful age. 7. That the money received from plaintiff's assignor by defendant Ulrickson upon the mortgage was used in paying off the above-mentioned liens to the amount of \$3,062.51, through the Security Bank of Renville, \$200 of which defendant Ulrickson received direct for the purpose of necessary expenses in connection with the loan, and was used for that purpose. It was further found that the Bank of Renville, as agent and representative of the mortgagee and defendant Ulrickson, at the request of defendant Ulrickson, paid out other moneys necessarily connected with the procuring of the loan, among which was \$31.51 for an insurance policy of \$1,400 upon the buildings situated on the land; and that all of the money obtained from the mortgage was so paid out under the directions and at the request of the father, Tideman Ulrickson, and the brother, Olaf J. T. Ulrickson. 9. That in or about June 10, 1899, the defendant Ulrickson executed, in writing, an instrument, which he caused to be served upon plaintiff's assignor on or about July 31, 1899, and upon the plaintiff on August 3, 1899, wherein he stated that at the time of the making and execution of the note and mortgage he was an infant, under the age of twenty-one years; that on April 7, 1899, he attained his majority; that he was of legal age, and elected and declared his intention not to be bound by said note and mortgage, repudiating the same. This notice was served within a proper and reasonable time after the defendant came of age. 10. The court further found that the defendant Ulrickson had at all times covered by ¹⁸ such proceedings been living upon the premises, together with his father and the other members of the family; that they had conducted the same as a farm; and that all of the lands situated in Renville and Kandiyohi counties constituted one farm, the value of which was \$8,000. And it further appeared that the defendant Ulrickson made no restoration of any part of the money received from said mortgage, either to

plaintiff or his assignor, and that he never surrendered, canceled, or assigned to either of them, or for their benefit, the insurance policy referred to.

As a conclusion of law, the court ordered judgment for plaintiff, directing that the land be sold to pay the amount of such note, with interest, amounting to \$4,038.62, together with costs, disbursements, and attorney's fees, and for a deficiency judgment against the defendant Ulrickson. After judgment had been entered and notice of an appeal to this court had been served, upon an order to show cause, the trial court amended the findings of fact and conclusions of law and the judgment by striking out therefrom all reference to such deficiency judgment. The cause comes to this court upon an appeal by defendant Ulrickson from the judgment. Appellant relies upon the following propositions: 1. That the contract was not for "necessaries," and was voidable; 2. That the defendant was not estopped by the false representations as to his age; 3. That he did not affirm the contract, or any part of it, but, on the contrary, disaffirmed it, upon arriving at legal age; 4. That in disaffirming the contract he was not required to return any part of the money received by him; 5. That by his disaffirmance the contract became void ab initio, and the title to the land reverted to the owners.

It is well settled in this state that, in so far as a contract is executory on the part of an infant, he may always interpose his infancy as a defense to an action for its enforcement: *Nichols & Shepard Co. v. Snyder*, 78 Minn. 502, 81 N. W. 516. There is nothing in the case to indicate that defendant did anything to affirm the contract, or any part of it, after he became of age. On the contrary, we think the findings are sufficient to show that he did everything he reasonably could to disaffirm the note, which was the only part of the contract remaining executory on the infant's ¹⁹ part that could be disaffirmed. If the defendant sought to disaffirm the entire transaction, he could only do so by restoring to the mortgagee or his assigns the money received and paid out for his own benefit in clearing the lands from encumbrances. This case may be examined from two points of view, either of which is fatal to appellant's position:

1. According to the facts found, the defendant voluntarily assumed the position of owner of the premises as the representative of the father, for the express purpose of raising the necessary funds to free the land from debt. He was not an

innocent purchaser. He took the conveyance with full knowledge of the facts, and there was no other consideration than the agreement to execute the mortgage for that express purpose. Having consented to act in such capacity, he will not be permitted to take advantage of his state of infancy, and hold the property in any other capacity than that which he assumed. The most ordinary rules of justice and fair dealing will foreclose his plea of infancy, and will not permit him to retain the land discharged from the encumbrances, even in the absence of false representations as to his age. Whatever may be his legal relations as to his father and brother regarding the ownership of the land, as to the holder of the mortgage, which was given to clear the land from debt, he stands in no better position than would the father had he executed the mortgage himself.

2. If we treat the conveyance by the father to the defendant as though made in good faith, and for a valuable consideration, and assume that the defendant was dealing as owner with the mortgagee, his position is equally untenable. If the money received upon the mortgage had been dissipated, or spent without reference to encumbrances, and without an improvement to the property, a different question might have arisen; but all of the money realized from the mortgage was expended for the purpose of saving the premises from being lost under the encumbrances. Under such circumstances, he could not disaffirm, and make a profit at the expense of those who furnished the money for such purposes. If he had not the money in specie to restore, he had the land, which had been protected and saved for him by means of ²⁰ that money. If he should elect to retain the land in its improved condition by means of that money, he must either restore the money, or submit the land to the lien imposed for such purposes. This would be his legal status in relation to the mortgagee, without reference to specific misrepresentations as to his age; and his position is so much the worse by reason of such fraudulent misrepresentations.

It is probably a sound rule of law which releases an infant from paying for goods which he has purchased by false representations as to his age, and which cannot themselves be restored, as held in *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; but that doctrine cannot be extended to enable an infant to retain land which has been preserved for him as in this case. The principle is the same: See discussion in

Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365, 45 Am. St. Rep. 473, 57 N. W. 934, 59 N. W. 992. A leading case upon this subject is **MacGreal v. Taylor**, 167 U. S. 688, 17 Sup. Ct. Rep. 961, wherein will be found a full discussion of the principles involved. It follows that the plaintiff, as the assignee of the mortgagee, is entitled to enforce the lien by a sale of the premises.

At the time the application was made to amend the findings and judgment, the notice of appeal and the bond of appeal had been served, but return had not been made to this court. Under these conditions the trial court had not lost jurisdiction of the case: **Briggs v. Shea**, 48 Minn. 218, 50 N. W. 1037; **Pratt v. Pioneer Press Co.**, 32 Minn. 217, 18 N. W. 836, 20 N. W. 87.

The point is made by appellant that the order striking out all reference to a judgment for deficiency is not in the nature of an amendment of a mistake or action taken through inadvertence, but that it is a deliberate finding by the court in the nature of a reconsideration of the issues in the case. The application for the order to show cause upon which the amendment was made was based upon an affidavit by attorney for the respondent to the effect that the reference to a deficiency judgment was included in the findings and judgment through inadvertence. Issue was taken by appellant upon this proposition, and the court made the amendment. The fair inference is that it was not the original intention of the court to find that the plaintiff was entitled to a judgment ²¹ for a deficiency, and that the amendment was made to make the record conform to the facts. But if there was any error in this ruling, the only advantage that could be taken of it in this court would be to procure a modification to that extent.

Judgment affirmed.

Disaffirmance of Infants' Contracts is discussed in the monographic note to **Craig v. Van Bebber**, 18 Am. St. Rep. 659-699. The privilege of infancy is to be used as a shield, and not as a sword: **Lice v. Butter**, 160 N. Y. 578, 73 Am. St. Rep. 703, 55 N. E. 275. A deed executed by a minor may be avoided by him on arriving at majority, though he represented himself to be of age: **Ridgeway v. Herbert**, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040. And an infant is not required as a condition to disaffirming his conveyance to restore the consideration if he has wasted it: **Bullock v. Sprowls**, 93 Tex. 188, 77 Am. St. Rep. 849, 54 S. W. 661; **Ridgeway v. Herbert**, 150 Mo. 606, 73 Am. St. Rep. 464, 51 S. W. 1040. It is otherwise, however, if he retains the consideration: **Craig v. Van Bebber**, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. 906. See, also, **Hobbs v. Nashville etc. Ry.**, 122 Ala. 602, 82 Am. St. Rep. 103, 26 South. 139.

KRAY v. MUGGLI.

[84 Minn. 90, 86 N. W. 882.]

APPEAL.—THE DOCTRINE OF THE LAW OF THE CASE does not apply on the second appeal of the same case, where the evidence is essentially different from that on the first. (p. 334.)

PRESCRIPTION.—THE ERECTION AND MAINTENANCE OF A DAM for more than forty years created a prescriptive right to continue its maintenance perpetually. (p. 335.)

PRESCRIPTIVE RIGHT FINDS NO SUPPORT IN PECUNIARY CONSIDERATIONS. Hence where one acquires a prescriptive right to have a dam maintained, it is immaterial that its removal will result in less damage than its maintenance. (p. 336.)

PRESCRIPTION—DAMS—RECIPROCAL RIGHTS OF RIPARIAN OWNERS.—Where the flow of a stream has been diverted from its natural channel, or obstructed by a permanent dam, and this has continued for the time necessary to establish a prescriptive right, the riparian owners along such stream, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed. (p. 336.)

PRESCRIPTION—ABUTTING OWNERS.—WHERE A HIGHWAY OR PUBLIC PARK has been laid out by lawful authority or acquired by dedication or prescription, the owners of property abutting thereon acquire a special right in the continuance of the park or highway, of which they cannot be deprived except by due process of law. (p. 339.)

Reynolds & Roeser, for the appellant.

G. W. Stewart and Stewart & Brower, for the respondents.

91 BROWN, J. This was an action to restrain and enjoin defendants from removing or destroying a certain mill dam across Sauk river, at Cold Springs, in Stearns county. The defendants recovered in the court below, and plaintiff appeals from an order denying a new trial. A former appeal in the case is reported in *Kray v. Muggli*, 77 Minn. 231, 79 N. W. 964, 1026, 1064.

The facts are substantially as follows: In 1856, a dam was built and constructed across Sauk river, at Cold Springs, Stearns county, by the Cold Springs Mill Company, which has ever since, except during a short period in 1865, when out of repair, been maintained for the purpose of developing water power to propel and operate mill machinery. No authority was obtained to so construct or maintain the dam by application or resort to legal proceedings, but the same was so built and constructed without special or granted right, and subse-

quently maintained by the mill company and its successors for over forty years, with the acquiescence and consent of the owners of riparian property affected thereby, by reason of which continued maintenance, and the consequent raising of the level of the water, and the adverse, uninterrupted, and exclusive use of the dam for said period of forty years, the mill company and its successors, Muggli and his ⁹² grantors, acquired the right by prescription perpetually to maintain the same. The effect of the dam was to raise the level of the waters to a height of seven and one-half feet, cause the same to set back and overflow large tracts of adjacent land to a distance of about sixteen miles up the river, and the formation of several lakes and ponds along its course. By the construction of the dam, and the consequent raising of the level of the waters of the river, the greater part of the land described in the complaint has since that time been overflowed and rendered valueless for agricultural purposes.

The defendants, other than defendant Muggli, own land abutting upon the river, and are residents and freeholders of the towns through which the river runs and flows. Nearly all of said defendants and their grantors have for more than forty years owned and occupied the lands so adjacent to said river and the lakes, and have cultivated and improved the same with reference to the conditions created and caused by the dam and the increased quantity of water occasioned thereby. Some of the defendants owned and occupied land bordering on the river prior to the construction of the dam, and, so far as the record in the case shows, at no time did they object to the dam or to its maintenance. At the time of the construction of the dam the public domain in this section of the state was unsurveyed. It was subsequently surveyed, and with reference to the conditions existing, with the waters of the river raised above its natural level seven and one-half feet, and the lakes formed thereby were meandered in all respects as though natural bodies of water. Some time prior to the commencement of this action defendant Muggli, who owns the mill property, entered into a contract with the other defendants, by which he attempted to sell and transfer to them the right to take out and remove the dam, such other defendants paying him for that right and privilege the sum of five thousand dollars. It is claimed by such defendants that by the removal of the dam large tracts of submerged land will be reclaimed and made valuable for agricultural purposes. Acting under this contract,

such defendants threatened to take out and remove the dam, and this action was brought to restrain them from doing so.

⁹³ The action was tried in connection with that of *Friedman v. Muggli*, 84 Minn. 90, 86 N. W. 1102, the object of which was the same as the object of this action. They were submitted to this court together. Plaintiff in this action is in the actual possession, under claim of title, of land bordering on the river, and has improved the same with reference to the conditions existing subsequent to the construction of the dam. His improvements were made in reliance upon the continuance of such conditions, and that the level of the waters in the lakes would remain as it had existed for years prior thereto, and for purposes of a pleasure resort, and for boating, fishing, and other amusements, in and about which improvements he expended a large sum of money, which will be practically a total loss if the dam is taken out. A portion of the land has been used for the pasture of stock, and the state of water as made by the dam is necessary to be maintained in order that he may fully enjoy his property. He placed a steamboat in the river at Cold Springs, which boat is used for transporting passengers from that point to a distance of about twenty miles up the river; and, if the waters are lowered to their stage before the erection of the dam, the river will be made non-navigable, and the lakes almost wholly destroyed.

In the other case, *Friedman*, the plaintiff therein, owns a large tract of land bordering on the river, and has been such owner and in the actual possession for the past thirty years. His land is used exclusively for farming and agricultural purposes. His fences, buildings, and other improvements were erected and made with reference to the artificial stage of the waters, and, if lowered by the removal of the dam, he will be greatly injured and damaged in the enjoyment of his property. The findings of the trial court with reference to the rights of the respective parties in the two actions are very full, and detail the facts with greater particularity than is necessary in this opinion. What we have stated, however, will give a general idea of the situation of the parties and the merits of the controversy.

When the action was here on the former appeal, it was determined adversely to plaintiff on the theory of comparative equities; it being held by the majority of the court at that time ⁹⁴ that the continued maintenance of the dam would work a

greater pecuniary injury and damage to the defendants, who, as we have noted, purchased the right to remove the same, than the removal thereof would result to plaintiff. The reasoning of the opinion on the former appeal we are satisfied, after mature reflection, was erroneous, and cannot be followed. The evidence before us at this time is materially different from what it was on the former trial. The trial court expressly finds that there was received on this trial a large mass of new and additional evidence, and the findings of fact are different in one respect, at least, from what they were on the former trial. This being the situation, the doctrine of the law of the case does not apply. None of the cases hold that such doctrine applies on the second appeal of the same case, where the evidence on the second trial was essentially different from that on the first: *McNamara v. Pengilly*, 64 Minn. 543, 67 N. W. 661.

To follow the reasoning of the former decision would result in confusion and flagrant inconsistencies. Although the defendants may have shown that the continued maintenance of the dam would work a greater injury to their property and rights than the removal thereof would work to the plaintiff's property, in another action brought by a riparian owner desiring the continuance of the dam, it might be shown that the injury and damage to him and his rights would be superior and greater than the injury to the same defendants. So that we would have in one action the solemn judgment of the court that, as between the parties to the particular action, the dam should be maintained in its present condition, and in another action, where other interested parties might seek to have the dam maintained, the solemn adjudication of the court that it be removed. If the equities, from a pecuniary standpoint, may be compared and applied at all, they must, in the nature of the surrounding conditions, be applied as between all those riparian owners and interested parties who desire the removal of the dam on the one hand, and all those desiring it maintained on the other. If the equities in favor of those desiring the removal were collectively greater ⁹⁵ and superior to those who desire its maintenance, the comparison might possibly be given effect.

But we are aware of no rule of law under which all such parties could be compelled to join in such an action. It is clear, however, that as between individual owners, contending on the one hand for the maintenance of the dam and on the

other for its removal, to apply the doctrine would be to inject into the situation difficulties and conflicting results, from which the court could not extricate itself. It appears from the memorandum of the learned trial judge that his views of the law on this subject were fully in accord with the result we have reached, but he had no alternative but to apply the rule laid down in the former decision of the case. Plaintiff in this action is in the actual possession of the land described in the complaint, and such possession is sufficient on which to base a right of action: *Witt v. St. Paul etc. Ry. Co.*, 38 Minn. 122, 35 N. W. 862.

Passing the question as to comparative equities, we come directly to the main controversy in the case, namely, What right in law or equity has the plaintiff to insist upon the continued maintenance of the dam? The right to maintain it on the part of the mill company was acquired by prescription. The mill company, in erecting it, obtained no express grant to do so from the riparian owners; but the erection and maintenance thereof for more than forty years created a prescriptive right to continue its maintenance perpetually. The inquiry is, What right, if any, accrued to the plaintiff and his grantors, and the other owners of property bordering on the river and the lakes formed thereby, as a result from the acts of the mill company and the acquisition by it of the prescriptive right to maintain the dam? The riparian owners improved their property, erected their buildings and fences with reference to the artificial stage of the water as made by the erection of the dam, and acquiesced in its maintenance during the time necessary to create and establish in the mill company and its successors the perpetual right to do so. It is contended on the part of plaintiff that there grew out of the relations between the parties, with respect to the construction and maintenance of the dam, reciprocal rights and privileges—⁹⁶ the right on the part of defendants to maintain it, and the right on the part of plaintiff to insist that it be maintained; while it is contended on the part of defendants that the only rights or privileges resulting from such relations accrued to them, that they may maintain the dam so long as they feel inclined to do so and then destroy it, regardless of the consequences to plaintiff and other riparian owners, and that the only right or benefit which accrued to plaintiff is the very valuable privilege of quietly submitting to the wishes and pleasure of defendants. We adopt the contention

of plaintiff as most in consonance with the equity and justice of the case. If plaintiff and his grantors acquired a reciprocal right to have the dam maintained, it is not material that its removal will result in less injury and damage to them than to defendants. Prescriptive right finds no support in pecuniary considerations. It is a right or privilege appurtenant and incident to realty, and passes with the title thereto.

The authorities are numerous that where the flow of a stream of water has been diverted from its natural channel, or obstructed by a permanent dam, and such diversion or obstruction has continued for the time necessary to establish a prescriptive right perpetually to maintain the same, the riparian owners along such stream of water, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed; and the person who placed the obstruction in the stream or caused the diversion of the waters, and all those claiming under or through him, are estopped upon principles of equity from restoring the waters to their natural channel or state: *Beeston v. Weate*, 5 El. & B. 986; *Roberts v. Richards*, 50 L. J. Ch. 297; *Jones on Easements*, sec. 808; *Gould on Waters*, secs. 159, 225; *Arkwright v. Gell*, 5 Mees. & W. 203, 10 Eng. Rul. Cas. 219, 225; *Belknap v. Trimble*, 3 Paige, 577. In the latter case, one involving the question here presented, the court said: "I apprehend also that this rule must be reciprocal, and that a proprietor at the head of a stream who has changed the natural flow of the waters and has continued such a change for more than ⁹⁷ twenty years, cannot afterward be permitted to restore it to its natural state, when it will have the effect to destroy the mills of other proprietors below, which have been erected in reference to such change in the natural flow of the stream."

In the case of *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344, a case involving this principle, it appeared that the course of a stream, running across the land of defendant to plaintiff's land, was changed by a sudden and unusual flood, so that it did not thereafter flow over the land of the latter. Defendant permitted the water to run in the new channel for ten years, and it was held that his acquiescence in the new conditions for so long a time gave rise to a right in plaintiff to insist that the new remain as the natural conditions. Other cases supporting this same doctrine are: *Ford v. Whitlock*,

27 Vt. 265; *Shepardson v. Perkins*, 58 N. H. 354; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Mathewson v. Hoffman*, 77 Mich. 420, 43 N. W. 879. The latter case is very similar to the one at bar, and directly in point. The court there said: "The exclusive enjoyment of water in a particular way for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise presumption of title against a right in any other person which might have been, but was not, asserted. This rule must be reciprocal, and one who has taken the water from the original channel, and has continued to divert and enjoy it for a period beyond the statute of limitation as to real actions, cannot afterward be permitted to restore it to its original state when it will have the effect to destroy or materially injure the property of those through or by which it formerly flowed."

Smith v. Youmans, 96 Wis. 103, 65 Am. St. Rep. 30, 70 N. W. 1115, is also directly in point. It is there held that it is but a fair inference that riparian owners, in view of the advantages that might or would accrue to them by raising the level of the waters of the lake on which their lands border, were induced to consent and acquiesce therein, and in the use of the dam and waters as raised thereby, in view of which it was held that the relations and interests of the parties thus originated and created became fixed by prescription, and imposed upon each reciprocal rights and duties. The court said: ⁹⁸ "It has long been settled that the artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained. The watercourse, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural watercourse prescriptively; and 'when a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel, to the injury of other proprietors along such channel, who have erected works or cultivated their lands with reference to the changed condition of the stream, or to the injury of those upon the artificial watercourse who have acquired by long user the right to enjoy the water there flowing': See, also, *Canton Iron Co. v. Biwabik Bessemer Co.*, 63 Minn. 367, 65 N. W. 643.

The dam in question, having been erected for the purpose of developing power to operate mill machinery, must be taken to be a permanent obstruction; and, it having existed and been maintained as such for so great a length of time, the artificial conditions created thereby must be deemed to have become the natural conditions. There is no suggestion in the evidence that the dam was placed in the river for temporary purposes, and even though it may at one time have been out of repair, it was nevertheless originally intended as a permanent structure. The authorities all hold, as far as our examination has extended, that in such cases the conditions arising from the permanent obstruction, though artificial to begin with, become by long lapse of time the natural conditions, and interested parties are bound by the rules of law applicable to such conditions: *Magor v. Chadwick*, 11 Ad. & E. 571; *Beeston v. Weate*, 5 El. & B. 986; *Roberts v. Richards*, 50 L. J. Ch. 297; *Mathewson v. Hoffman*, 77 Mich. 420, 43 N. W. 879; *Finley v. Hershey*, 41 Iowa, 389; *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698. In the case at bar even nature herself became adapted to the new surroundings. A native growth of hardwood timber sprang⁹⁹ up along the shores of the lakes formed by the rise of the river, thus giving a natural effect and appearance to the conditions created by the dam. The government, in the survey of the lands in that vicinity, recognized the artificial as the natural state, and surveyed the public lands with reference to the lakes, meandering them precisely as other natural bodies of water are surveyed and meandered. There can be no difference on principle between cases where the natural channel of a stream is changed and diverted, and those where a permanent obstruction is placed therein. In either case the rights of the parties are essentially the same.

An examination of the books discloses that this same doctrine is applied to public highways and public parks. Where a highway or public park has been laid out by lawful authority, or acquired by dedication or prescription, the owners of property abutting thereon acquire a special right in the continuance of the park, street, or highway, as the case may be, of which they cannot be deprived except by due process of law. The right accrues to them, in cases where the highway or park is acquired by dedication, by the same proceedings and acts that vest the right in the public. Where land is expressly dedicated for a public park, and is improved as such

by the public authorities, special rights result and accrue to abutting owners, which vest and are created by the act of dedication: *Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286, 292, 12 Am. St. Rep. 644, 39 N. W. 629. In the case of *Moose v. Carson*, 104 N. C. 431, 17 Am. St. Rep. 681, 10 S. E. 689, it was held that the owners of lots cannot be deprived of the easement appurtenant in the street adjacent thereto, which is distinct from the public right, nor can the legislature grant power to take it from them. The abutting owners in such cases have the right to insist that the street remain.

The case of *Le Clercq v. Trustees, etc.*, 7 Ohio (pt. 1), 218, 28 Am. Dec. 641, was an action by owners of lots adjoining a public park, which had been dedicated to the public use by the owner of the land, to enjoin the public authorities from vacating the park. It was there held that the plaintiffs, though individual owners of lots abutting the public square, could maintain their action to preserve the park for¹⁰⁰ public use. It appeared that they improved their property with reference to the park, and the decision was placed distinctly on the ground that the act of dedication conferred upon them a separate and independent right to have the park maintained. In the case of *Town of Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761, it was held that the owners of lots abutting the public street have a peculiar and distinct interest in the easement, and that such interest is distinguished from the rights of the general public, in that it becomes an interest legally adhering to the contiguous grounds and buildings thereon, by affording more convenient facilities for their use; and, as the owner of the abutting property may have erected his buildings and made his improvements with reference to the street as existing, it is a valuable property right, which is recognized by the law, and cannot be appropriated or taken from him without his consent: *Elliott on Roads and Streets*, secs. 150, 877. The act which gives rise to the public right, the act of dedication, vests a distinct and independent right in abutting property owners, which they may protect by application to a court of equity.

The doctrine of these cases is applicable to the case at bar. The mill company acquired its right to maintain the dam by prescription, and during the time such right was maturing, a reciprocal right in the riparian owners to insist that it be maintained, at least that no overt act be taken for its removal, was also maturing, which ripened and became equal to the

right of the mill company upon the completion of the prescriptive period. The reciprocal right thus created was not merely a personal one, but a right appurtenant and incident to the lands.

Something was said on the argument with reference to the right of a mill owner to abandon his mill and permit the dam to become out of repair and finally destroyed by the elements, and the question was suggested as to whether he could be compelled to repair the same or be required to maintain the dam after its abandonment; and it is further mooted whether or not the riparian owners would have the right to enter upon the mill owner's property, in the case of his failure or neglect to keep the dam in repair, and put it in order and maintain it at their ¹⁰¹ own expense. These questions are not involved in the case, and we do not decide them. When they are presented in any proper case they will be taken up and disposed of in the usual way. It may be doubted whether the mill owner could be compelled to maintain the dam in good repair. No principle of law making it his duty to do so now occurs to us. But it is not so clear but that the riparian owners, having acquiesced in the maintenance of the milldam for such a length of time as to create a perpetual right in the mill owner to maintain it, out of which, within the authorities we have cited, grew the reciprocal right to insist that it be not disturbed, and that the water as raised by the dam be maintained at its artificial height, would have the right to enter upon the property and repair any defects in the dam, and keep and maintain it in order and repair at their own expense.

But these questions are not before the court, and we do not decide them, nor do we wish to be understood as expressing any opinion with reference thereto. The action is to restrain and enjoin defendants from taking any active or affirmative steps looking to the removal of the dam, and whether they may be compelled by law to keep it in repair is not involved in the determination of the case. We hold that they may be restrained from committing any overt act, and from taking any affirmative steps looking to the removal of the dam. Perhaps the apparent difficulties in the matter of keeping the dam in repair after abandonment by the mill owner may be relieved and obviated by an application of the provisions of the Laws of 1897, chapter 88. We have not considered the question whether defendants could be restrained from taking out the dam because of the statutes prohibiting

the draining of meandered lakes. The disposition of the case on the other question renders it unnecessary.

The order appealed from is reversed.

Start, C. J., dissents.

Waters—Prescription.—The Artificial State or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing; and from it arises a right on the part of those interested to have the new condition continued: *Smith v. Youmans*, 96 Wis. 103, 65 Am. St. Rep. 30, 70 N. W. 1115. Thus, a stream that has been diverted from its natural channel by a freshet, and allowed by an adjoining proprietor to flow over his land for ten years, cannot be restored by him to its original course: *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344; and acquiescence in the diversion of a stream from its natural course by riparian owners below the point of diversion for thirty years is binding on them, and prevents their changing the flow from the new into the old channel: *Matheson v. Ward*, 24 Wash. 407, 85 Am. St. Rep. 955, 64 Pac. 520. See, further, *Pewaukee v. Savoy*, 103 Wis. 271, 74 Am. St. Rep. 859, 79 N. W. 436; *Albert Lea v. Nielsen*, 80 Minn. 101, 81 Am. St. Rep. 242, 82 N. W. 1104.

NORTHERN PACIFIC RAILWAY CO. v. TOWNSEND.

[84 Minn. 152, 86 N. W. 1007.]

PRESCRIPTION.—THE REAL OBJECT OF A STATUTE RELATING TO ADVERSE POSSESSION is to prevent litigation, and to quiet title to land which has remained in the possession of another adversely and in hostility to its true owner for the specified period of time. (p. 347.)

PRESCRIPTION.—A RAILWAY COMPANY MAY BE DEPRIVED OF A PART OF ITS RIGHT OF WAY by adverse occupation for the statutory period of time. (p. 347.)

PRESCRIPTION.—REAL PROPERTY BELONGING TO MUNICIPAL CORPORATIONS and quasi public corporations can be lost under the statute by adverse possession. (p. 347.)

PRESCRIPTION.—THE RIGHT OF A RAILWAY COMPANY UNDER AN ACT OF CONGRESS to use and occupy a right of way over the public domain four hundred feet wide is subject to the statute relating to adverse possession. (pp. 348, 349.)

PRESCRIPTION.—THE MAKING OF A HOMESTEAD ENTRY under the United States homestead laws initiates an adverse and hostile claim to the land as against third parties which will ripen into a good title by adverse possession if continued for the period of time required by the statute of limitations. (p. 349.)

HOMESTEAD—GOVERNMENT LAND.—WHEN A PATENT issues to one who has previously made a homestead entry upon government land, it relates back, for all purposes, to the time of the original entry. (p. 349.)

A. G. Broker, for the appellants.

C. W. Bunn and James B. Kerr, for the respondent.

¹⁵² COLLINS, J. Ejectment brought to recover possession of two strips of land situate on either side of plaintiff's railway track, where the same crosses three forties of the northwest one-quarter of section 24, township 134, range 35.

¹⁵³ It is conceded that, under the land grant act of July 2, 1864, the filing of a map of definite location in 1871, and by the construction of its railway, the Northern Pacific Railroad Company, plaintiff's predecessor, acquired a right of way four hundred feet in width where the road ran through and over what was then public domain, which included the quarter section in question. These strips were originally part of this way. The defendant, Minerva Townsend, is the grantee of two persons who entered these forties under the United States homestead act subsequent to 1871, and to whom they were duly patented. She admits that the right of possession and possession, constructively, at least, were originally in the plaintiff's predecessor, but claims that possession and the right thereto have been wholly lost by reason of the fact that her grantors and herself have been in actual, open, notorious, and adverse possession of these strips, and cultivating the same, continuously for more than fifteen years before the commencement of this action. The court below so found, and that this had been with the knowledge of the officers and agents of plaintiff company, and of its predecessor, the original beneficiary of the act of Congress by which the right of way was granted and its width fixed, but held that plaintiff was entitled to recover, because the right of way, as the same was fixed by the act of Congress, was charged with a public use to its full width, and because, as a part of the railroad property, the way was inseparable from the franchise, and was not the subject of alienation. Therefore no part of it could be lost by adverse possession. Because of this peculiar public use to which the four hundred foot strip had been devoted by the grant, it was held that the land in dispute was not subject to the operation of our statute of limitations as to adverse possession. On appeal the question is whether any part of the right of way, as fixed and granted by the act of Congress, can be lost by adverse occupation for a period of fifteen years.

The argument of counsel for the railway company is that, as the right of way was granted by Congress to the company to enable it to perform the duties which it owed to the public under its charter, and as the whole thereof was charged with a public ¹⁵⁴ use, and as it is clear, upon principle and authority, that the company is without power to convey any portion thereof as granted, it inevitably follows that no part of this four hundred foot strip is subject to any statute which would reduce its width, or prevent the plaintiff company from using it, as a whole, for railway purposes, and to its full width. The decisions, urge counsel, are conclusive on the proposition that a railway corporation owing duties to the public in the exercise of its corporate functions cannot, by voluntary conveyance or otherwise, part with any of its property necessary for a proper discharge of these duties.

A number of cases are cited in support of this statement. We see no reason to question the rules of law laid down in these cases, but, in our opinion, they are not in point here. One of them (*Thomas v. Railroad Co.*, 101 U. S. 71) was where the defendant railway company undertook to lease all of its road, rolling-stock, and its franchise, for which leasing no special authority had been conferred by its charter. The court held that such a contract was invalid. Another (*East Alabama Ry. Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. Rep. 869) was where a railroad corporation having a franchise to own and operate a road acquired an easement for its right of way through certain lands partly by grant and partly by condemnation. After a part of its line was graded, a judgment creditor levied an execution on the right of way, and it was sold and conveyed to him by the sheriff. The court held that, by itself and separately, the right of way could not be sold on execution, and that the creditor had obtained no title.

In both these cases the acts complained of (a lease in one case, and a forced sale of the right of way in the other—an actual dismemberment of this right from the franchise) were of such a nature that the corporations could not perform the functions for which they were created, or the duties which they owed to the public, should the acts be upheld. In the *Thomas* case the act of the company was clearly *ultra vires*, for it had no authority to lease, and in attempting so to do was disabling itself from performing its corporate functions. In the *Doe* case the controlling ¹⁵⁵ idea was that the right

of way, being a mere easement in the land, was indissolubly linked, so long as they should exist, to the franchise, to the purpose of the existence of the corporation, and to its public functions, and that they could not be separated by a sale of the right of way.

The present case is not parallel to either of these. Here the company built its road more than twenty years ago, fenced a strip one hundred feet in width—fifty feet on each side of its track center—has used that strip, and no more, and has acquiesced in the use and cultivation by defendants and their predecessors of all of its original grant lying outside of its fences for more than fifteen years, under a claim of right. It has not attempted to lease its entire property, nor has there been a proceeding in invitum whereby it could be prevented, by an actual dismemberment of its right of way from its franchise, from properly exercising its corporate functions, or from performing its duties to the public. But in this connection we call attention to *Crolley v. Minneapolis etc. Ry. Co.*, 30 Minn. 541, 16 N. W. 422, wherein it was said, when considering a conveyance by a railway corporation, that no one whose interests are not affected except the state, can call in question the capacity of the corporation to sell or hold property.

But counsel point with emphasis to the case of *Northern Pac. R. Co. (the predecessor of this plaintiff) v. Smith*, 171 U. S. 260, 18 Sup. Ct. Rep. 794, as being conclusive here. We take their statement of the facts in issue as correct. Smith brought an action in ejectment against the company to recover possession of certain premises situated within two hundred feet of its track center as built within the limits of the town of Bismarck, North Dakota. It appeared that the company had originally located its line some distance south of the present site of that town, and had filed its map of definite location in the office of the commissioner of the general land office. Thereafter, in 1873, and without filing any new map, the company changed its location, and constructed its road just where it has since remained. Afterward—in 1879—the townsite of Bismarck, including the tract sued for, was patented to the mayor, and the same year a deed of conveyance ¹⁵⁶ covering the premises in question was executed to Smith by the town authorities. Upon these facts the court held that, under the act or grant of Congress, and by virtue of the construction of its road, the company obtained a right of way,

two hundred feet in width upon either side of the center line of its tracks as the same were laid upon the ground; that the rights of the plaintiff were subject to this grant to its specified width, and that the tenants of the company could not be ejected from the property in dispute. That part of this decision to which attention has been called is as follows: "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes, in the face of the grant, and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants."

It having been decided in this case that by its grant Congress conclusively determined that a strip four hundred feet in width was necessary for a right of way, and, further, that a court could not cut it down to twenty-five feet, it is urged that it must follow that our statute of limitations cannot apply to any part of this grant, because the result would be to cut down the right of way to less than four hundred feet in width. But, in answer to this, attention may be called to the fact that in every state where the width of a railway right of way is fixed by statute the legislature has quite as conclusively determined what width is necessary for the purpose as has Congress by the act in question.

It is impossible for us to see that the doctrine established in the Thomas case is determinative of this, or is in point at all. The mere fact that Congress had conclusively determined that the right of way should be four hundred feet in width across the public domain, and thereupon it was decided that what was thus declared to be necessary could not be cut down by the courts, ¹⁵⁷ does not infringe at all upon defendant's claim that the plaintiff company may lose a portion of its original right of way by adverse possession, and be barred from recovery by the fifteen years statute of limitations. The question was whether, upon shifting its track line after filing a map of definite location, the company took a right of way under the act of Congress, and to the width therein described, or a way of less width—what it actually used. Surely, no private person could question the right of the company to

change its line, unless his rights had intervened, and had become attached to land in dispute, prior to such change. If this right to change could not be questioned, it would necessarily follow that the federal government only could insist that the width of the right of way was not the same, wherever the road might actually be constructed. No criticism could well be made of the language used or the conclusion reached; but neither language nor conclusion control this case any more than they would if the right of way had been obtained under a provision of an act passed by the legislature of one of the states, or by purchase.

But it is rather singular, when we consider the assertion made by counsel as to the impossibility of a railway company to part from any portion of its right of way voluntarily or involuntarily, that in the Smith case the right to lease was recognized, for the only possession relied upon by the plaintiff company was that of its tenants, concerning which the court said: "The precise character of the business carried on by such tenants is not disclosed, but the court is permitted to presume that it is consistent with the public duties and purposes of the railroad company." By this quoted expression the court distinctly recognized that the defendant company had leased, and had the power so to do, when the occupation of its tenants was not inconsistent with or opposed to the proper operation of its road and to the performance of its duties as a common carrier. And we are safe in saying that on the facts now before us the presumption arises that the occupation by defendants of the tract in question, outside of the plaintiff's fences, conflicts not at all with a proper operation of its ¹⁵⁸ railway, and is not in the way of a complete performance of plaintiff's duties to the public.

The real object of this statute of limitations is to prevent litigation, and to quiet title to land which has remained in the possession of another adversely and in hostility to its true owner for the specified period of time. Such a law is a continual and decisive notice to owners that, if they allow others adversely to occupy, use, and improve their land for fifteen years continuously, they must be deemed to have acquiesced in the assertion of the occupants' claim of right to use the same, and to have abandoned all opposition thereto. There may be exceptional instances in which the nature of the right affected or the character of the party in whom the title is vested will prevent the operation of the statute, but

the facts here do not come within the exception. That a railway company may be deprived of a part of its right of way by adverse occupation for the statutory period of time, and that such an occupation will bar its right to eject its adversary, has often been determined by the courts of this country: *Pittsburgh etc. Ry. Co. v. Stickley*, 155 Ind. 312, 58 N. E. 192; *Matthews v. Lake Shore etc. Ry. Co.*, 110 Mich. 170, 64 Am. St. Rep. 336, 67 N. W. 1111; *Littlefield v. Boston etc. R. R. Co.*, 146 Mass. 268, 15 N. E. 648; *Illinois etc. R. R. Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002, and cases cited. See, also, upon this subject, 15 Harv. Law Rev. 146. It has also been decided that it is immaterial whether title is held by the company in fee simple, or is a mere easement, or a qualified fee, or an absolute fee; for, whichever it is, the right conferred is a possessory one, and sufficient to sustain an action of ejectment.

Nor is it material whether the statute, under which the defendants claim, is regarded as one indulging in the presumption of a grant by the true owner or is simply a statute of repose. We have held that it is the latter in *Dean v. Goddard*, 55 Minn. 290, 56 N. W. 1060. We have also decided that real property belonging to municipal corporations and quasi public corporations can be lost under the statute by adverse possession: *City of St. Paul v. Chicago etc. Ry. Co.*, 45 Minn. 387, 48 N. W. 17; *St. Paul etc. Ry. Co. v. City of Minneapolis*, 45 Minn. 400, 48 N. W. 22; *Village of Wayzata v. Great Northern Ry. Co.*, 50 ¹⁵⁹ Minn. 438, 52 N. W. 913. Municipal corporations hold real property for public use and for public purposes in a greater sense than do railway companies hold their right of way. There is no reason whatever for determining that the former are subject to the operation of the statute, and at the same time hold that the latter are exempt from the operation of the same law. Such a conclusion would take front rank among the legal absurdities.

Let us look at the judgment from which the defendants have appealed from a practical standpoint, and see what it means if the contention of plaintiff's counsel be sustained. The right of way granted under the act of July 2, 1864, was east and west across and through this state from Lake Superior to the Red River of the North, over the public domain. Although part of the territory to be traversed had been disposed of by the federal government prior to the passage of the act, the grant came very near being a strip of land four

hundred feet wide for about two hundred and fifty miles. If plaintiff's claim be upheld, we should have, stretching across the state from east to west, a strip of territory four hundred feet wide, upon which no person could travel without committing a trespass; over which no railway company could obtain the right to lay its rails, and across which no public highway could be established, except by consent of plaintiff. If counsel should be sustained, the public could not obtain the right, by proceedings under the statutes, or even by prescription, to a public way for ordinary travel, and municipal authorities would have to enter into private negotiations with plaintiff in order to secure the privilege of a highway crossing of this strip; and so would corporations organized for public purposes, and equipped with the right of eminent domain. Any and all of these proceedings would be as inimical to the rule which counsel assert in this case, and quite as open to the objections now relied upon, as is the application of the statute of limitations as to adverse possession to the facts now before us. It would be preposterous to announce a rule of law which would uphold and permit such a result. No matter what rights the beneficiary of the grant may have to use and occupy, if it so chooses, its right of way over and through public domain to the full extent of four hundred ¹⁶⁰ feet, it is obvious that it must take this right subject to the statute relating to adverse possession. No other conclusion can be tolerated.

As to one forty of the three, it is claimed that from the findings it clearly appears that the strips therein have not been, and could not be, held adversely for the full period of fifteen years prior to the commencement of this action. From the record it seems that this tract of forty acres was entered under the homestead laws of the United States by a man named Brown, February 1, 1882, subject, of course, to the provisions of the prior grant to the Northern Pacific Company. A receiver's final receipt was issued to him December 26, 1887, and a patent July 24, 1889. The claim is that prior to the time of the issuance of the final receipt Brown was occupying the forty in subordination to the title of the United States, and could not avail himself of the statute of limitations. It is urged that he could not, and was not, holding possession adversely to all titles and to all claimants, and for this reason the statute does not apply.

But it is immaterial when Brown obtained evidence of his title—his paper title. He initiated his adverse and hostile claim to the strips in dispute upon making his homestead entry, more than fifteen years prior to the commencement of this action. He and his grantors continuously thereafter occupied parts of the forty with intent to claim the same as against the company. His entry and possession were adverse. Both were hostile in their origin, and hostile in their continuance. As to both strips, Mr. Brown and the defendants were precisely in the position of anyone who had entered into possession thereof under a claim of title, and without reference to the balance of the forty.

But if this were not so, and his and their title to these strips had to depend upon and be connected with his homestead entry, the fact is that, upon making this entry, in 1882, his rights to the forty became fixed and certain. They were not subordinate to the government title, and could not be taken away from him by any other person, natural or artificial; and when the patent was issued to him, in the year 1889, it related back, for all purposes, to the time of the original entry. No distinction between the ¹⁶¹ forties can be made when considering and determining the question in issue.

The judgment appealed from is reversed, and upon remittitur judgment may be entered in favor of the defendants.

Title by Adverse Possession may, by the weight of authority, be acquired of land held by railroads or other quasi public corporations: See the monographic note to *Northern Pac. Ry. Co. v. Ely*, post, p. 000. A few of the states are committed to the doctrine that title by adverse possession may be acquired in property held by a municipal corporation in its public capacity. But this doctrine is opposed both to principle and the overwhelming weight of authority: See the monographic notes to *Schneider v. Hutchinson*, 76 Am. St. Rep. 492-495; *Northern Pac. Ry. Co. v. Ely*, post, p. 000.

WHITNEY v. WAGENER.

[84 Minn. 211, 87 N. W. 602.]

EVIDENCE. — OFFICERS OF A CORPORATION ARE MERE AGENTS, AND THEIR DECLARATIONS are binding upon it only when made in the course of, or connected with, the performance of their authorized duties. (p. 352.)

EVIDENCE. — THE DECLARATIONS OF AN AGENT CAN NOT BE RECEIVED in a suit to which he is not a party to establish the alleged fact that he, and not his principal, is the owner of property in controversy. (p. 352.)

EVIDENCE — DECLARATIONS. — THE POSSESSION OF PROPERTY BY ONE AS AN OFFICER OR AGENT of a corporation is not sufficient to render his declarations as to his ownership thereof admissible against the corporation or those claiming through it. (p. 352.)

ATTACHMENT — RELEASE — BURDEN OF PROOF. — A SHERIFF who, in legal effect, releases a plaintiff's attachment without his consent has the burden of justifying his action by showing that the debtor in the attachment suit had no leviable interest in the property. (p. 353.)

William G. White, for the appellant.

John E. Stryker, for the respondent.

212 **START, C. J.** On January 6, 1898, the C. E. Sherin Agency, a corporation, hereinafter called the "agency," recovered a judgment upon a promissory note in the district court of the county of Ramsey against the trustees of the Atlantic Congregational Church of St. Paul, for the sum of seven hundred and three dollars. The plaintiff herein, Milton B. Whitney, a judgment creditor of Clarence E. Sherin and Carrie E. Sherin, began an action against them upon his judgment, then amounting to the sum of seventeen hundred and sixty-nine dollars and sixty-nine cents, in the district court of the county of Ramsey, and caused a writ of attachment to be issued against them, which was delivered to the defendant as sheriff of that county. Thereupon the defendant, as such sheriff, by virtue of the writ, levied upon and attached all the title and interest of **213** Clarence E. Sherin and Carrie E. Sherin in and to the judgment so recovered by the agency against the trustees of the church. An execution was issued on this judgment and delivered to the defendant, who, as sheriff, collected the amount thereof and paid it to the agency without the knowledge of the plaintiff, instead of holding it upon the attachment which he had theretofore levied upon the judgment

at the suit of the plaintiff. Judgment was entered in favor of the plaintiff in his attachment suit against the Sherins, execution issued thereon and delivered to the defendant, as sheriff, who returned it unsatisfied.

Thereupon the plaintiff brought this action to recover from the sheriff the amount of the judgment so levied upon by virtue of such writ of attachment. The answer alleged, besides other matters, that the judgment upon which the attachment was levied was the sole property of the agency, and that neither of the defendants in the plaintiff's attachment suit had, at the time such levy was made, any interest whatever therein. This was denied by the reply, and the issue so made was the principal one litigated on the trial. The trial court at the close of the plaintiff's evidence dismissed the action, on motion of the defendant, on the ground that the evidence conclusively established the fact that the judgment was the sole property of the agency.

The plaintiff appealed from an order denying his motion for a new trial. The record presents for our consideration two general questions:

1. Did the trial court err in excluding certain alleged declarations and admissions of Clarence E. Sherin, the treasurer and manager of the agency, as to the ownership of the judgment in question? The alleged admissions were made to the pastor and one of the trustees of the church, and were to the effect that he (Clarence E. Sherin) was the owner and in possession of the note upon which the judgment against the church was based, and that the agency held it only for collection. The plaintiff here urges the exclusion of this evidence as error, because it tended directly to support his claim made on the trial that Clarence E. Sherin in fact owned both the note and judgment. The contention of the plaintiff in this connection is that the declarations of Clarence E. ²¹⁴ Sherin were admissible as the admissions of the agency, because he was at the time an officer of that corporation.

It is true that declarations of officers of a corporation within the scope of their authority are admissible in evidence against the corporation if otherwise material and relevant. The rule rests, however, on the doctrine of agency; for such officers are mere agents, and their declarations are binding upon the corporation only when made in the course of or connected with the performance of authorized duties of such officers: *Browning v. Hinkle*, 48 Minn. 544, 31 Am. St. Rep. 691,

51 N. W. 605. There was no evidence in this case that the alleged declarations of Sherin were authorized by the corporation, or were connected in any manner with the discharge of any duties by him as an officer or agent of the corporation. This case then falls within the rule that the declarations of an agent cannot be received in a suit to which he is not a party to establish the alleged fact that he, and not his principal, is the owner of the property in controversy: *Greene v. Dockendorf*, 13 Minn. 66 (70); *Presley v. Lowry*, 25 Minn. 114; *Van Doren v. Bailey*, 48 Minn. 305, 51 N. W. 375.

It is further urged that the declarations were admissible because made by Sherin while he was in the actual possession of the note upon which the judgment rests.

The short answer to this claim is that there is no evidence in this case, outside of his alleged declarations, that he then had the note in his individual possession. It was necessary to establish the fact of his possession by evidence other than his declarations. Such evidence, however, need not be conclusive. His possession of the note as an officer or agent of the corporation would not be sufficient to render his declarations as to his ownership thereof admissible against the corporation or those claiming through it. Any other rule would permit such an officer or agent indirectly to turn over the entire corporate property to his creditors, by admitting or declaring that he owned it—an unthinkable proposition. It follows that the trial court did not err in excluding the proposed evidence.

2. The other general question is, Was the evidence, when the ²¹⁵ plaintiff rested his case, sufficient to justify a verdict in his favor for anything more than nominal damages?

We answer the question in the negative. The admitted conduct of the defendant, as sheriff, was, in legal effect, a release of the plaintiff's attachment without his consent. Such being the case, it must be conceded that the burden was upon the defendant to justify his action by showing that neither of the debtors in the attachment suit had any leviable interest in the judgment against the church: 1 Shinn on Attachments, secs. 392, 396. The question of the burden of proof, however, is not a practical one in this case, for the plaintiff on the trial assumed the burden of proving that the defendants in the attachment suit, or at least one of them, owned the judgment upon which his writ was levied.

The evidence received by the court on behalf of the plaintiff established beyond reasonable controversy that the father

of Carrie E. Sherin was the original payee and the owner of the note against the church, that he sold it to her, and that she sold it to the agency, which never parted with it. The plaintiff, however, claims that there was evidence tending to show that Clarence E. Sherin at some time after the agency became the owner of the note, became the owner thereof in some undisclosed way. The only basis for this contention is certain declarations of Sherin and of the attorney of record of the agency in its suit on the note against the church. These declarations were neither competent nor relevant, for reasons already suggested.

Order affirmed.

Declarations of Agent.—What an agent says while acting within the scope of his authority is admissible against his principal as part of the *res gestae*. What he may say at other times is not. And the declarations of officers of corporations rest upon the same principles as apply to other agents: *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339, 98 Am. Dec. 229; *Burnside v. Grand Trunk Ry. Co.*, 47 N. H. 554, 93 Am. Dec. 474; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710, 34 N. E. 910; *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158, 39 Am. St. Rep. 637, 26 Atl. 27, 537; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899; *Plymouth County Bank v. Gilman*, 4 S. Dak. 265, 48 Am. St. Rep. 786, 56 N. W. 892; *Phelps v. James*, 86 Iowa, 398, 41 Am. St. Rep. 497, 53 N. W. 274; *Larson v. Metropolitan St. Ry. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. 416; *Browning v. Hinkle*, 48 Minn. 544, 31 Am. St. Rep. 691, 51 N. W. 605; *Morrow v. Goodrich*, 92 Me. 393, 69 Am. St. Rep. 512, 42 Atl. 797. The declarations of a servant in possession of chattels attached for his debt that they are his property are inadmissible against his master in an action against the attaching officer: *Abbott v. Hutchins*, 14 Me. 390, 31 Am. Dec. 350.

McCLYMOND v. NOBLE.

[84 Minn. 329, 87 N. W. 838.]

UNKNOWN OWNERS—PUBLISHING SUMMONS.—In an action under the Minnesota statutes allowing suits to be brought to determine the adverse claims of unknown owners to land, service of summons may be made by publication without an order of court. (p. 355.)

JURISDICTION OF UNKNOWN OWNERS.—IN AN ACTION TO DETERMINE THE ADVERSE CLAIMS of unknown owners to land, the fact that the named defendant in the summons was dead when the action was commenced will not prevent the court from acquiring jurisdiction to determine the rights of unknown claimants. (p. 355.)

WHERE AN UNKNOWN OWNER IS A RESIDENT OF THE STATE when an action is begun to determine adverse claims to land, the fact that the summons was served by publication only will not affect the jurisdiction of the court. (p. 355.)

CONSTITUTIONAL LAW—PROCEEDINGS IN REM.—A STATUTE AUTHORIZING AN ACTION TO DETERMINE ADVERSE CLAIMS OF UNKNOWN OWNERS is in the nature of a proceeding in rem, and is therefore not unconstitutional by reason of the fact that the summons is allowed to be served by publication. (p. 356.)

JUDGMENT—VACATION—DILIGENCE.—A motion to vacate a judgment determining adverse claims to land is properly denied, where the party fails to show proper diligence in making it after he first learned of such judgment. (pp. 356, 357.)

A. J. Finnegan, for the appellants.

F. W. Murphy and W. H. Townsend, for the respondent.

330 START, C. J. This is an action to determine adverse claims to a tract of eighty acres of land in the county of Traverse, brought June 26, 1899, pursuant to the provisions of the General Statutes of 1894, section 5818, against David P. Noble, the person who appeared by the record to have some interest in the land, and also against all other persons or parties unknown claiming any right, title, or interest therein or lien thereon. Notice of lis pendens was made and recorded in the office of the register of deeds of the proper county, and published with the summons in the action. An affidavit for the publication of the summons was duly made and filed, and the sheriff of the proper county made return upon the summons that none of the defendants could be found in his county, but no order for the publication of the summons was ever made by the court. Other than as stated, the summons was never served on any of the defendants. Judgment by default for the plaintiff was entered December 28, 1899.

On February 18, 1901, Aaron T. Noble, herein designated as the defendant, the sole heir at law of David P. Noble, appeared specially, and moved the trial court to vacate the judgment on the ground that the court had no jurisdiction to enter the same. Upon the hearing of the motion the following additional facts were established: David P. Noble died intestate in the state of Wisconsin, April 2, 1892, leaving him surviving, as his only heir at law and next of kin, the defendant, who for thirty years last past has resided in the city of Mankato, this state, but it did not ³³¹ appear that this fact was known to the plaintiff prior to the making of the motion. The defendant had no knowledge of this action until December

31, 1900. The trial court on February 23, 1901, by its order of that date, denied the motion, and the defendant appealed therefrom.

The first reason urged by the defendant why the court was without jurisdiction in the premises is that no order for the publication of the summons was ever made by the court. None was required, for this is an action against the party who appeared of record to have some title to the land, and also against all other persons or parties unknown claiming any interest therein, and the statute authorizing the action expressly provides that the service of the summons may be made by publication, as provided by law in case of nonresident defendants. In such a case no order of the court for the service of the summons by publication is or has for the last thirty years been necessary, unless otherwise expressly provided by law: Gen. Stats. 1894, sec. 5204; *Easton v. Childs*, 67 Minn. 242, 69 N. W. 903.

It is also urged that the court acquired no jurisdiction in this case, because the only party indicated by his name in the summons, David P. Noble, had been dead nearly eight years when the action was commenced, and no jurisdiction to bind the interest of the defendant, his sole heir, could be acquired by the service of the summons by publication. The fact that the named defendant in the summons was dead when the action was commenced did not prevent the court from acquiring jurisdiction to determine the rights of other persons or parties unknown, claiming an interest in the land described in the lis pendens: *Inglee v. Welles*, 53 Minn. 197, 55 N. W. 117.

Nor did the fact that the defendant was a resident of the state when the action was begun, and that the summons was served only by publication, affect the jurisdiction of the court over the land, and its power to award the judgment in question. This question was exhaustively considered in the case of *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773, and decided adversely to the contention of the defendant. This court held in that case, distinguishing *Bardwell v. Collins*, 44 Minn. 97, 20 Am. St. Rep. 547, 46 N. W. 315, that ³³² the action authorized by the General Statutes of 1894, section 5818, is in the nature of a proceeding in rem, the subject matter of which is the adjudication of the state of the title of the land within the jurisdiction of the court. Therefore, the provisions of the statute for the service of the summons upon unknown claimants were constitutional and valid. No other substantial

objections to the judgment were made on the argument of the appeal, and it follows that the trial court was right in refusing to vacate it on the ground that it had no jurisdiction to enter it.

After the district court had refused to set aside the judgment on the motion of Aaron T. Noble, as stated, and on April 2, 1901, William E. Harrington, hereafter designated as the appellant, gave notice of a motion to be heard April 15, 1901, to open the judgment, and to be permitted to answer the complaint in this action. The grounds of the motion, as stated in the notice, were to the effect that the appellant was the owner in fee of the premises described in the complaint; that the plaintiff's title was based upon a tax title, which was void and subject to redemption; and, further, that justice and equity required that the judgment be opened, and the appellant be permitted to answer, and have the action tried on its merits. The court made its order denying this motion, from which the appellant appealed.

The only facts stated by the appellant in his affidavit in support of the motion were that he was the owner of the land in question, having purchased it from Aaron T. Noble, the heir at law of David P. Noble, deceased, and paid a valuable consideration therefor; that the only claim the plaintiff had to the land was based on tax certificates which were void and subject to redemption; that he had a good defense to the action on the merits; and that immediately on acquiring title to the land he employed an attorney to make a motion for leave to answer. But as to when he acquired his supposed title, or when he first learned of the judgment—matters within his personal knowledge—he was silent. It appears, however, from the affidavit of his attorney used in support of the motion, that Aaron T. Noble conveyed his interest in the land to appellant after the former employed an attorney to get the judgment vacated as void. It also appears from Aaron 333 T. Noble's affidavit, also used on the motion, that he did not learn of the judgment prior to December 31, 1900.

Now, waiving the question as to the sufficiency of the notice of motion, we are of the opinion that the trial court was justified, in the exercise of a fair discretion, in denying the appellant's motion on the ground that he failed to show proper diligence in making it after he or his grantor first learned of the judgment. But this is not all. The appellant asserted as one of the reasons why he should be permitted to answer that the plaintiff had no title to the land except a void tax

title. The plaintiff on the hearing met this issue by showing that he was in fact the honest and equitable owner of the land, it having been entered as a soldier's additional homestead, for which David P. Noble had been paid.

The trial judge, upon the whole record, may well have concluded that the appellant, or some "prowling assignee" by the use of his name, was seeking, by a technicality, to deprive the plaintiff of his land. In any event, we are of the opinion that the court properly exercised its discretion in denying the motion.

It follows that both orders appealed from in this case must be and are affirmed.

UNKNOWN OWNERS, PROCEEDINGS AGAINST.

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I. Purpose of Proceedings.

Statutes have been passed in a number of our states similar in their general terms to the statute under consideration in the principal case. The object of such acts is to permit the adjudication of rights in property situated within the borders of the particular state, and the provision that unknown owners or claimants may be served with process by publication springs from the necessities of the situation: See *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551; *Bleldorn v. Pilot Mountain etc. Co.*, 89 Tenn. 166, 15 S. W. 737; *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778.

The principle is that a state may provide for the adjudication of all adversary rights of persons in property within its borders, even against unknown persons, and the state has the right to prescribe the procedure and methods by which such results are accomplished: *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613. A state is under no obligation to leave the title to property, real or personal, in abeyance for an indefinite period, and may, therefore, provide appropriate judicial procedure for determining who is entitled to an estate: *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585. This necessity of bringing in parties by merely giving them constructive notice by publication, and the power of a state to authorize such proceedings was ably presented in *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557. This case did not involve proceedings against unknown owners, but against nonresidents. The principle, however, is identical, and has been applied to proceedings against unknown owners, and this case has been cited and quoted from to sustain proceedings against unknown owners: See, especially, *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778. For this reason we quote the excellent statement of the law as laid down in this case by Justice Brewer. The question is, "What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of nonresidents to such real estate? If a state has no power to bring a nonresident into its courts, for any purpose, by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjective to the rules concerning the holding, the transfer, liability to obligations private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title to real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in nature. . . . It remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with special inhibitions of the constitution, or against natural justice.

.... The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

This opinion presents most clearly the purpose for which such statutes have been passed authorizing proceedings against unknown claimants to property, and the obvious necessity which exists for such legislation. Such proceedings are necessary to prevent a failure of justice: *Reed v. Gregory*, 46 Miss. 740.

II. Constitutionality.

The validity of statutes authorizing proceedings against unknown persons has been drawn in question in a number of cases, and almost uniformly have been sustained. The proceedings must be essentially in rem, against the property to be effected: *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; since proceedings in personam are ineffective without personal service. The chief objection that has been raised and urged against proceedings of this character has been that no adequate notice has been served upon unknown claimants to the property, and that they have, therefore, been deprived of their property without due process of law: See *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585. But as has already been pointed out, states have power over property within their limits, and may provide for the adjudication of rights in such property, irrespective of the question in whom those rights may be vested. The right to personal notice is not a law of nature: *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217. And the guaranty of "due process of law" does not necessarily require personal service of notice: *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773. The legislature may provide for a substituted service of judicial process by publication when the necessities of the case so require: *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551. And such a necessity is deemed to exist when there are unknown claimants to property, the title to which is in dispute and requires to be settled: *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613; *Bleidorn v. Pilot Mountain etc. Co.*, 89 Tenn. 166, 15 S. W. 737. A state is allowed to settle titles to lands within its borders: *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613. As was said in *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep.

585, where a citation to unknown heirs had been served by publication: "When a man dies, the legislature is under no constitutional obligation to leave the title to his property, real or personal, in abeyance for an indefinite period; but it may provide for promptly ascertaining, by appropriate judicial proceedings, who has succeeded to his estate. If such proceedings are had, after actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants, who are unknown, the final determination of the right of succession, either among private persons, as in the ordinary administration of estates, or between all persons and the state, as by inquest of office or similar process to determine whether the estate has escheated to the public, is due process of law."

In these cases of necessity it remains with the legislature to determine what proceedings shall be instituted to adjudicate and settle the titles to property situated within the state and unless the proceedings are in conflict with some particular constitutional inhibition, or against natural justice, the proceedings are valid: *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557. The question of constitutionality was clearly presented in *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773. "Under the constitution," said the court, "legal proceedings in the courts are under the direction of the legislature, subject, of course, to the fundamental provisions of the bill of rights. But the guaranty of 'due process of law' does not necessarily require personal service of notice upon parties resident or nonresident. The legislature may, in its discretion, provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court; and with a reasonable exercise of such legislative discretion the courts will not assume to interfere. . . . Clearly, within the rule stated are statutory regulations providing for the service of notice by publication upon unknown heirs and claimants in cases involving the settlement of estates or the title of lands. As in other cases, 'where actual notice cannot be given, there must either be no remedy, or constructive notice must be substituted as sufficient, and what constructive notice shall be given is a question of legislative discretion, rather than of power.'" It is, therefore, held that the legislature may, by statute, authorize proceedings by action against unknown claimants, and bind them by constructive or substituted service or notice, in actions to determine adverse claims to real property. And such statutes are not in conflict with the state or federal constitutions, as depriving persons of their property without due process of law: *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *Leigh v. Green* (Neb.), 90 N. W. 254; *Bleidorn v. Pilot Mountain etc. Co.*, 89 Tenn. 166, 15 S. W. 737; *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585. And see *Burton v.*

Perry, 146 Ill. 71, 34 N. E. 60, where the proceedings were held valid.

The necessity must exist for the service by publication, and the proceedings against the property must be in the nature of proceedings in rem. Hence, a statute passed by the Iowa territory legislature relative to land owned by half-breed Indians, in which suits in personam were authorized to be instituted, no other designation of the defendants being required than that they were "owners of the half-breed lands lying in Lee county," was declared unconstitutional, and the proceedings under it were held to be void: *Webster v. Reid*, 11 How. 437; *Reed v. Wright*, 2 G. Greene, 15. This remarkable act did not provide for personal notice upon any owners who were known and within the territory. Naturally it could not be upheld. So of a statute in Ohio, which simply provided for a notice "to whom it may concern," although the names, residences, and interests of adverse claimants were known, the court, in *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, 47 N. E. 551, very properly held that it was unconstitutional.

In a proceeding against unknown heirs, under a statute, the court cannot determine the rights of known heirs, the statute being unconstitutional in so far as it required no notice to be given to known heirs or their successors in interest: *People v. Ryder*, 65 Hun, 175, 19 N. Y. Supp. 977.

III. Procedure.

a. Statute must be Followed.—In order for the court to acquire jurisdiction so that it may render a decree that will be binding upon unknown persons joined as defendants, the provisions of the statute must be strictly complied with, since it is only by virtue of the statute that any decree can be entered at all: *Guise v. Early*, 72 Iowa, 283, 33 N. W. 683; *Ware v. Easton*, 46 Minn. 180, 48 N. W. 775; *McMahan v. Smith*, 69 Ark. 591, 65 S. W. 459; *Bleidorn v. Pilot Mountain etc. Co.*, 89 Tenn. 166, 15 S. W. 737.

b. Petition.—Actions against unknown owners are usually begun by a petition, which must be sworn to: *Guise v. Early*, 72 Iowa, 283, 33 N. W. 683; *Charles v. Morrow*, 99 Mo. 638, 12 S. W. 903; *Rohrer v. Oder*, 124 Mo. 24, 27 S. W. 606; *Bleidorn v. Pilot Mountain etc. Co.*, 89 Tenn. 166, 15 S. W. 737. If the petition is not sworn to as required by statute, the court acquires no jurisdiction of the unknown defendants: *Guise v. Early*, 72 Iowa, 283, 33 N. W. 683. The plaintiff must show by petition that there are persons interested in the subject matter of the action whose names he cannot insert because they are not known to him: *State v. Staley*, 76 Mo. 158; *Myers v. McRay*, 114 Mo. 377, 21 S. W. 730. Usually, it is sufficient if it is made to appear that there are unknown parties: *Thornton v. Houtze*, 91 Ill. 199. In *Allen v. Allen*, 11 How. Pr. 277, it was held sufficient to allege, after those specifically named, "and others, owners unknown." Under the Arkansas statute it is not sufficient merely to state that the heirs or owners of the property are un-

known, but it must appear that they are unknown to the plaintiff: *McMahan v. Smith*, 69 Ark. 591, 65 S. W. 459. And in the opinion of two of the justices in this case, an allegation was necessary that the names of the defendants were unknown to the plaintiff, and not merely that he is unacquainted with or does not know the heirs or owners of the property. That the defendants' names were unknown and could not be ascertained are jurisdictional facts in Tennessee. Hence, a mere allegation that they were the heirs of a named person is insufficient. They must be expressly proceeded against as "unknown" parties: *Bleldorn v. Pilot Mountain etc. Co.*, 89 Tenn. 166, 15 S. W. 737. And the same case holds that an averment that all the defendants are nonresidents is sufficient to authorize publication of summons against named nonresidents, but not against those who are unknown. To the same effect, see *Rohrer v. Oder*, 124 Mo. 24, 27 S. W. 606.

In Missouri, at least, the petition should also describe the interests of the unknown defendants and how they are derived, so far as the plaintiff's knowledge extends: *State v. Staley*, 76 Mo. 158; *Charles v. Morrow*, 99 Mo. 638, 12 S. W. 903; *Myers v. McRay*, 114 Mo. 377, 21 S. W. 730. And the statement in regard to the interest of the unknown heirs or owners must be sworn to, as this is essential to the acquisition of jurisdiction by the court: *Charles v. Morrow*, 99 Mo. 638, 12 S. W. 903; *Myers v. McRay*, 114 Mo. 377, 21 S. W. 730; *Rohrer v. Oder*, 124 Mo. 24, 27 S. W. 606.

Under the Missouri statute, it is a sufficient description of the interest of unknown defendants, and how it is derived, to allege that the unknown heirs of a person named are the owners of certain real estate by descent: *Brickell v. Farrell*, 82 Fed. 220.

c. **Affidavit.**—An affidavit is usually required to be filed showing that the defendants are unknown, before the court will authorize the publication of summons: *Benningfield v. Reed*, 8 B. Mon. 102; *Hynes v. Oldham*, 3 T. B. Mon. 266; *Pile v. McBratney*, 15 Ill. 314. An affidavit filed with the bill, coupled with proper advertisement or publication in due form, will give the court jurisdiction over the unknown defendants: *Pile v. McBratney*, 15 Ill. 314. An affidavit in the form of the statute that the names and residences of heirs are unknown is sufficient basis for citation by publication, it being unnecessary to state what means or efforts the plaintiff had taken to ascertain the names and residences of such persons: *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613. But in Mississippi the affidavit must aver that diligent exertions have been made, without success, to ascertain the names of the unknown claimants: *Kirkland v. Texas Exp. Co.*, 57 Miss. 316. In Wisconsin, the affidavit for the publication of summons against unknown defendants must show that a cause of action exists against them: *Nelson v. Rountree*, 23 Wis. 367, following *Slocum v. Slocum*, 17 Wis. 150 (155). In Kentucky, there must be an affidavit by each of the complainants that the heirs or other defendants are unknown to him: *Jeffrey v.*

Hand, 7 Dana, 89; *Thruston v. Masterson*, 9 Dana, 228. And where there are several plaintiffs, an affidavit by one of them only, stating that the defendants were unknown is insufficient, there being nothing to show that they were not known to the other plaintiffs: *Kane v. Rock River Canal Co.*, 15 Wis. 179 (196). Where several suits are brought for the collection of taxes upon property assessed to unknown owners, one affidavit for publication of summons may be made and used in the several cases: *Moss v. Mayo*, 23 Cal. 421.

In Kentucky, it has been held that while an affidavit for publication is required by statute, yet a decree against unknown owners is not void because no affidavit was filed stating that they were unknown, but only voidable: *Benningfield v. Reed*, 8 B. Mon. 102; *Hynes v. Oldham*, 3 T. B. Mon. 266.

d. **Parties.**—There is no defect of parties by reason of the fact that an action is brought against unknown heirs, where the statute authorizes such a proceeding: *Truesdell v. Rhodes*, 26 Wis. 215. In a suit against unknown owners, the party in whose name the title to the property involved appears of record must be named as a defendant in the proceedings: *Ware v. Easton*, 46 Minn. 180, 48 N. W. 775. Parties may be served with process by publication against them as unknown heirs, although their ancestor had never himself been a party to the suit: *Kilmer v. Brown* (Tex. Civ. App.), 67 S. W. 1090. When the heirs of a deceased person are necessary or proper parties to a suit, and their names are unknown, they may be so described and made parties defendant by publication, without reference to their residence, or whether they are present or absent from the state: *Reed v. Gregory*, 46 Miss. 740.

IV. Proceedings in Which Allowable.

a. **General Equity Proceedings.**—As a general rule, equity jurisdiction is exercised in personam and not in rem. Hence, ordinary proceedings in equity, such as a bill to remove a cloud upon title, or for specific performance of an agreement to convey land, are not proceedings in rem, but the decree which may be entered in such cases operates in personam only: *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586. Therefore, equity cannot usually act upon non-residents who do not appear or upon unknown parties. And as was said in the case just cited: "A court of equity acts in personam, by compelling a deed to be executed or canceled by or on behalf of a party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title." But the same case recognizes the power of a state in which land lies to provide by statute for the bringing in of nonresident defendants by publication, for the purpose of appointing a trustee to act for him. And in *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. Rep. 557, it was finally settled that a state had power to provide by statute that the title to real estate within its limits should be settled and determined by a suit in which nonresident defendants are brought into court by publica-

tion. To the same effect is *Ormsby v. Ottman*, 85 Fed. 492, 29 C. A. 295.

From the discussion in these cases it is obvious that, ordinarily, equity acts in personam and not in rem, and that unknown claimants cannot be made parties to equity suits, and a decree cannot be rendered against them, in the absence of a statute authorizing proceedings against such parties.

b. Suits Against Unknown Heirs.—The state is under no obligation to leave the title to a decedent's estate in abeyance for an indefinite period. Hence, statutes may provide for suits against unknown heirs, by means of which all claims of such unknown persons may be effectually cut off: See *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585. And accordingly statutes have been passed in many of the states authorizing proceedings against unknown heirs.

In order to give the court jurisdiction of such unknown parties, it should be made to appear that there are unknown parties, and that the notice required by statute shall have been published as to them: *Thornton v. Houtze*, 91 Ill. 199. Under the statute of Arkansas, it must appear that the names of the unknown heirs or other persons are unknown to the plaintiff: *McMahon v. Smith*, 69 Ark. 591, 65 S. W. 459. The unknown heirs of a deceased may be joined as parties and jurisdiction over them secured by publication, although their deceased ancestor was never a party to the proceedings: *Kilner v. Brown* (Tex. Civ. App.), 67 S. W. 1090. Such proceedings are valid, and any decree rendered may be enforced in so far as it is in the nature of a judgment in rem, but not if it is a judgment in personam: *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; *Kilmer v. Brown* (Tex. Civ. App.), 67 S. W. 1090. But a decree against the unknown heirs of a person supposed to be dead, when he, in fact, is living, is void as to the ancestor, and cannot affect his property rights, since, during his life, he can have no heirs capable of being sued as unknown heirs: *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60.

In *Simmons v. Heirs of Fry*, 19 D. C. 472, a suit was sustained against the unknown heirs of a decedent who had attempted to convey certain land to the plaintiffs, and it was held that the decedent's contract to convey could be enforced against the unknown heirs, and that a trustee could be appointed by the court to execute conveyances of the lands to the complainants, according to their respective interests. A suit against unknown heirs may cut off the rights of brothers and sisters of the deceased, whose names are known, for, observed the court in *Guyer v. Raymond*, 8 Misc. Rep. 606, 29 N. Y. Supp. 395, "If he is dead, his heirs are unknown, for who can say who they are without some proof on the subject?" But in such a proceeding the rights of known heirs cannot be adjudicated and determined, and a statute which attempts to authorize such proceedings is unconstitutional: *People v. Ryder*, 65

Hun, 175, 19 N. Y. Supp. 977. So, where a husband is the heir of his wife, an allegation that her heirs are unknown, and publication against them as such, will not bind him: *Taylor v. Bate*, 4 T. B. Mon. 267. A wife, so far as her community interest in the land of her deceased husband is concerned, is not an heir of her husband, and such community interest cannot be affected by a recovery obtained in a suit against his unknown heirs: *Bassett v. Sherrod*, 13 Tex. Civ. App. 327, 35 S. W. 312; *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560, 26 S. W. 99. And one claiming title to land as the only heir of an intestate, cannot maintain a suit by publication against the unknown heirs of such intestate, to remove a cloud on title: *Cashman v. Cashman*, 123 Mo. 647, 27 S. W. 549.

c. **Partition.**—A statute permitting summons to be served by publication upon unknown claimants of property applies to all actions in which service of publication may be made: *Bergen v. Wyckoff*, 84 N. Y. 659. It is, therefore, held proper to sue unknown defendants in a proceeding brought for the partition of land: *Allen v. Allen*, 11 How. Pr. 277; *Bergen v. Wyckoff*, 84 N. Y. 659; *Guyer v. Raymond*, 8 Misc. Rep. 606, 29 N. Y. Supp. 395; *Kirkland v. Texas Express Co.*, 57 Miss. 316; *Kane v. Rock River Canal Co.*, 15 Wis. 179 (196). And also in an action of trespass to try title to an undivided interest in land and for a partition thereof: *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; *Bassett v. Sherrod*, 13 Tex. Civ. App. 327, 35 S. W. 312. Such suits are proceedings in rem: *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778.

d. **Foreclosure.**—So, too, unknown claimants may be barred by foreclosure proceedings: *Moran v. Conoma*, 13 N. Y. Supp. 625, 36 N. Y. St. Rep. 680; *Wheeler v. Scully*, 50 N. Y. 667. A purchaser at such sale, therefore, cannot refuse to complete his purchase on the ground that no valid judgment can be rendered against the alleged unknown owners, and that their interest in the land cannot be extinguished: *Moran v. Conoma*, 13 N. Y. Supp. 625, 36 N. Y. St. Rep. 680. Neither is it any defense on the part of a purchaser that some of the unknown claimants or heirs to the land may be infants, since the service of summons by publication is sufficient even as against unknown infants: *Wheeler v. Scully*, 50 N. Y. 667.

e. **Quieting Title.**—As illustrated by the principal case, actions to determine adverse claims to real estate may be brought against unknown persons. Such an action is, in effect, a suit to quiet title. While in Texas it is held that an action of trespass to try title is broad enough to embrace every character of litigation affecting title to real estate: *Hardy v. Beaty*, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778. And such suits may be brought against unknown parties. An equitable suit to remove a cloud from the title to land may be brought against unknown claimants under a statute allowing the publication of summons against such persons, if there are any unknown claimants. Hence, one who claims title as an only heir cannot maintain a suit to remove a cloud on his title, by

publication against the heirs of the intestate: *Cashman v. Cashman*, 123 Mo. 647, 27 S. W. 549. An action to remove a cloud and to quiet title is not an action in personam, but an action for land, and the judgment affects the title to the land. Hence, statute may authorize such an action against unknown owners: *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613.

f. **Enforcement of Taxes.**—By statute in some states, as in California, land may be assessed to an unknown owner, and tax suits to recover the taxes may be begun against unknown owners, and the court may acquire jurisdiction by the publication of summons: *Moss v. Mayo*, 23 Cal. 421. The state may make the unknown heirs of a deceased owner parties to an action to enforce the state's lien for back taxes: *State v. Staley*, 76 Mo. 158. And the holder of a tax certificate may bring a suit to foreclose the lien of such certificate, and make the land a party thereto, alleging in his petition and affidavit for publication that the owner is unknown, and such unknown owners will be bound: *Leigh v. Green* (Neb.), 90 N. W. 254. In this case it was held that under the statute authorizing such proceedings, the owner of land was deemed to be "not known," when the holder of the tax certificate was unable, by reasonable diligence and inquiry in the neighborhood of the land, to learn the whereabouts of persons appearing to have estates therein, or when he is unable to ascertain who have such estates.

g. **Escheated Land.**—If the title to land fails for want of heirs, it escheats to the state, either by operation of law or by reason of some judicial proceedings. The usual legal presumption is that an estate has heirs, and the title does not vest in the state until after proceedings have been instituted and a judgment rendered: *Wilbur v. Tobey*, 16 Pick. 177; *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585. Accordingly, it is provided in some of our states that an action may be begun against all persons known or unknown who are interested in the estate, and the judgment rendered is conclusive evidence of the state's title, and binding upon all unknown persons interested who had constructive notice of the proceedings by publication. The statute in Texas is for the purpose of giving effect to escheats, applies both to real and personal property, and while not, strictly speaking, a proceeding in rem, partakes sufficiently of the character of such a proceeding as to sustain a judgment against unknown parties, who have been served by publication with notice of the proceedings: *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585; *Wiederanders v. State*, 64 Tex. 133; *Hanna v. State*, 84 Tex. 664, 19 S. W. 1008.

h. **Specific Performance of Contract.**—A contract of a decedent to convey land may be specifically enforced against the unknown heirs of the decedent: *Simmons v. Heirs of Fry*, 19 D. C. 472. A decree entered in such a case will not be binding if the ancestor happens not to be dead: *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60.

And a husband who is the heir of his wife will not be bound by a decree against the unknown heirs of such wife, the husband being known: *Taylor v. Bate*, 4 T. B. Mon. 267.

V. Effect of Judgment.

a. *In General.*—A judgment is binding upon all unknown persons who claim any interest in the property, if they have been served by publication in accordance with the terms of the statute authorizing such proceedings: *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. Rep. 585. If a person is sued as an unknown owner, and appears and files an answer, he will be bound by any decree entered, although the bill was not amended so as to make him a party by name: *Clarke v. Chamberlain*, 70 Ill. App. 262. Mere irregularities in proceedings against unknown heirs, which might be corrected upon appeal, will not render the judgment entered subject to collateral attack: *Bassett v. Sherrod*, 13 Tex. Civ. App. 327, 35 S. W. 312. Publication of summons against unknown owners is not sufficient to sustain a judgment against a known owner who is alleged in the petition to be known: *Dickey v. City of Chicago*, 152 Ill. 468, 38 N. E. 932.

In some states a decree against unknown parties does not become final until the lapse of a certain specified time; as for example, three years in Illinois and Wisconsin: *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60; *Gray v. Gates*, 37 Wis. 614. Parties purchasing the land within the three years do so subject to the contingency that the decree may be set aside. But when three years have passed, and no steps have been taken by unknown owners to open or set aside the decree, it will have the same effect as though there had been personal service: *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60. After such time, the court has no power to disturb the decree, even upon the application of a defendant who had no actual notice of it until a short time before making the application: *Gray v. Gates*, 37 Wis. 614.

b. *Upon Infants.*—Under statutes authorizing proceedings against unknown persons, and providing that process may be served upon them by publication, infants will be bound as unknown claimants by service upon them by publication, unless the statute makes an exception in their favor: *Moran v. Conoma*, 13 N. Y. Supp. 625, 36 N. Y. St. Rep. 680; *Wheeler v. Scully*, 50 N. Y. 667. Hence, in a suit to foreclose a mortgage, in which unknown heirs are joined as parties, a purchaser at the foreclosure sale cannot refuse to complete his purchase upon the ground that some of the unknown heirs may be infants, against whom the judgment would not be binding: *Wheeler v. Scully*, 50 N. Y. 667.

MARENGO v. GREAT NORTHERN RAILWAY CO.

[84 Minn. 397, 87 N. W. 1117.]

RAILROADS—FENCES.—A RIGHT TO RECOVER FOR INJURIES TO A CHILD OF TENDER YEARS accrues where such injuries are caused by the failure of a railroad company to fence its tracks as required by statute. (p. 370.)

THE OBLIGATION OF A RAILROAD COMPANY TO FENCE ITS TRACKS AS REQUIRED BY STATUTE IS ABSOLUTE, save where there is some exception by implication based upon public policy, necessity, or convenience. (pp. 370, 371.)

RAILROADS—FENCES—DEFENSE.—A railroad company cannot relieve itself from negligence in failing to fence its tracks by showing that another railroad, similarly situated, has also been guilty of the same fault. (p. 371.)

PUBLIC STREETS FURNISH AN EXCEPTION TO THE DUTY OF A RAILROAD COMPANY TO FENCE its tracks as required by statute. (p. 371.)

RAILROADS—FENCES ACROSS STREETS.—Under a statute requiring a railroad company to fence its tracks, it cannot be required or even permitted to build fences across legally laid-out highways, even if such highways are unopened and untraveled. (p. 371.)

A COURT CANNOT ENTER A JUDGMENT NOTWITHSTANDING A VERDICT, where the result is to deprive a litigant of the right to have the facts in a common-law issue determined by the jury instead of absolutely by the court. (p. 372.)

F. D. Larrabee, for the appellant.

W. E. Dodge, Rome G. Brown, and Charles S. Albert, for the respondent.

³⁹⁹ **LOVELY, J.** Camile Marengo, an infant of tender years, went upon the tracks of defendant in Northeast Minneapolis, and while there was seriously injured by one of its trains. The father of Camile brings suit to recover for the injuries to his minor son under the statute: Gen. Stats. 1894, sec. 5164; also a separate action for the damages which he sustains as the child's parent. The cases were tried together. Separate verdicts were rendered for plaintiff in each case. Defendant moved for judgments notwithstanding the verdicts, or for new trials in the alternative. The trial court ordered judgments for the defendant, and specifically denied the motion for a new trial in each case. Plaintiff appeals from the respective orders, which brings the entire record here for review.

A description of the place of the accident is essential to a proper understanding of the questions to be reviewed. Four

tracks of defendant extend in a northwesterly and southeasterly direction parallel to each other for more than a half mile through what the defendant designates as its "Northeast Minneapolis Yard." There is also, on the easterly side of these tracks, running parallel and in close proximity thereto, a track of the Northern Pacific Railway Company. The land adjacent to the railway tracks on the east for several hundred feet between the same and Monroe street—a thoroughfare running due east and west some distance therefrom—is an open field, but we are required by the concessions in the pleadings and the course of counsel at the trial to treat such open prairie as platted from the tracks to the line of Monroe street, although unopened by the city authorities at the time of the accident. Twenty-second and Twenty-third avenues are open and traveled from the east to Monroe street, but are not open farther west, although their lines extend on the plat over the field, as well as across the railway lines. Neither the defendant nor the Northern Pacific Railway Company have fences adjacent to their right of way east of their tracks.

⁴⁰⁰ The injured minor was a young lad of less than seven years, living with his parents. He left home on the morning of the accident. Seeing some boys west of the tracks, supposing they were his brothers, he ran over to the place where they were. Finding they were not the persons he thought, he immediately started to return, and while on one of defendant's tracks was thrown or fell under the wheels of a freight-car then being moved by a locomotive, which caused the injury complained of.

The substantive basis of plaintiff's right to recover is defendant's neglect to maintain fences, as required by law, on the east side of its tracks, by reason of which the young lad was permitted, without legal fault on his part, to stray upon the place of danger. The right to recover for injuries to children in such cases has been already settled, and we are not inclined to disturb the rule laid down in the late decisions of this court in respect to the obligation of railway companies in that respect: *Rosse v. St. Paul etc. Ry. Co.*, 68 Minn. 216, 64 Am. St. Rep. 472, 71 N. W. 20; *Nickolson v. Northern Pac. Ry. Co.*, 80 Minn. 508, 83 N. W. 454.

Railways must observe the statute, save where there is some exception by implication based upon public policy, necessity, or convenience, which requires such exception as station

grounds, streets, public places, etc.: *Greeley v. St. Paul etc. Ry. Co.*, 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179. In these cases the burden of showing the exception rests upon the company: *Cox v. Minneapolis etc. Ry. Co.*, 41 Minn. 101, 42 N. W. 924.

An exception would probably also apply to yards devoted distinctively to switching and the work of receiving, distributing, or making up and sending out trains, whenever the legal duty of maintaining cattle-guards at highway crossings might seriously endanger the lives of switchmen in the use of the tracks. This exception is not, however, in this case, for the evidence does not establish such a use of the tracks referred to as would bring into operation conditions that would make it applicable. There were switches, to a limited extent, several hundred feet distant from where the boy was hurt, on either side of the place. It may be stated, however, that the railroad tracks in this case were similar in that ⁴⁰¹ respect to those in *Nickolson v. Northern Pac. Ry. Co.*, 80 Minn. 508, 83 N. W. 454, the switching therein being merely incidental to the movements of trains.

The exception to the statute, being based upon reason and convenience, cannot be extended beyond what reason and convenience require, so as to deprive the public of the benefit of the proper police regulations provided in such cases for its protection. Nor does the fact that another railroad company runs a parallel track on the east side of defendant's tracks relieve it from its statutory duty to fence its tracks. The obligation to fence is absolute. Public interests are involved in its performance, and, if the defendant company could not so arrange with the adjacent company that the entire tracks would be protected in the manner required by law, it was in duty bound to see that its own right of way was properly protected. It could not relieve itself from its own negligence in that respect by showing that another railroad company, similarly situated, had also been guilty of the same fault: *Railway Co. v. Allen*, 40 Ohio St. 206.

Undoubtedly, public streets furnish an exception to the duty of the railroad to fence, and defendant could not be required, or even permitted, to build fences across legally laid-out highways. That this would apply to traveled highways is, of course, too plain to admit of doubt: *Greeley v. St. Paul etc. Ry. Co.*, 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179. But it was urged on the trial in behalf of plaintiff that the avenues

crossing the platted but unopened field, and extending upon and over the tracks, did not constitute an implied exception to the statute in the same degree as if they had been formally opened and used for travel by the public.

We cannot adopt this view. The railroad company had nothing to do with the platting or the opening of these streets, but it was legally bound to recognize the right of the public therein. If it did not, it might be liable to prosecution. Hence the company might properly say that such streets, though unused, were liable to be opened at any moment by the authorities. They were the subject of public control, and therefore furnished a proper exception to the extension of fences across the same. But of defendant's ⁴⁰² sure and perfect obligation to fence along the tracks between the platted and unopened streets there can be no question; and if the evidence tended to show that the child strayed upon the track at a point between the unopened highways where no fences had been constructed, it was the duty of the trial court, under proper instructions, to have submitted the plaintiff's right to recover to the jury.

The claim of plaintiff in this respect is that the young lad went upon the tracks between Twenty-second and Twenty-third avenues, where it was, as we have held, defendant's duty to maintain a fence. This, under the evidence, was an important and vital issue in the case, and, as we understand the views of the trial court in ordering the judgments absolute for defendant, it did so for the reason that there was a failure on the part of the plaintiff to establish that fact sufficiently and distinctively. It is not to be doubted that the burden rested upon plaintiff to show that the child strayed upon the tracks at a point where it was the duty of the defendant company to fence its tracks; and if it has failed in this respect, or if the testimony is, as claimed by defendant, so vague and uncertain in its tendency to show where the child went upon the right of way that it is just as probable that he went there at a place where defendant was not in duty bound to fence as at a place where it was, plaintiff could not recover. But, conceding this, we do not think that the trial court was necessarily justified in ordering judgments against the verdicts in favor of the defendant.

We are unable to interpret Laws of 1895, chapter 320, authorizing the entry of judgment by the court, notwithstanding a verdict, so as to deprive a litigant of the right to have the

facts in a common-law issue determined by the jury instead of absolutely by the court. Such an interpretation would deprive the litigant of his right of trial by jury. To sustain the statute, it must be construed so as to harmonize with that constitutional right: *Cruikshank v. St. Paul etc. Ins. Co.*, 75 Minn. 266, 77 N. W. 958; *Marquardt v. Hubner*, 77 Minn. 442, 80 N. W. 671; *Kreatz v. St. Cloud School Dist.*, 79 Minn. 14, 81 N. W. 533; *Bragg v. Chicago etc. Ry. Co.*, 81 Minn. 130, 83 N. W. 511.

403 Evidence to locate the place where the child strayed upon the track is, upon this record, somewhat vague and indefinite, but it seems reasonably apparent from a review of the same that upon another trial the failure of proof in that respect could be remedied, and we must, for that reason, in view of previous rulings, reverse the order of the trial court ordering judgments in these cases in favor of the defendant. It is very clear that the court denied the part of the alternative motion asking for a new trial, upon the ground that it deemed it its duty to direct a judgment with which a new trial would be radically inconsistent. It follows that the trial court has not exercised its discretion upon the weight of the testimony, and we shall therefore decline to anticipate action in that respect, or to consider that question, which embraces an original function of the lower court, rather than of a court of review.

The orders directing judgments in favor of defendant in these cases are reversed, and each case is remanded for a new trial upon the merits.

Statutes Requiring Railroad Companies to Fence their tracks and erect cattle-guards impose an absolute duty, not only to protect the lives of animals, but also to protect human beings upon trains, by keeping the track clear of obstructions: *Terre Haute etc. Ry. Co. v. Williams*, 172 Ill. 379, 64 Am. St. Rep. 44, 50 N. E. 116. See, in this connection, *Dickson v. Omaha etc. Ry. Co.*, 124 Mo. 140, 46 Am. St. Rep. 429, 27 S. W. 476; *Siglin v. Coos Bay Co.*, 35 Or. 79, 76 Am. St. Rep. 463, 56 Pac. 1011; *Winkler v. Carolina etc. Ry. Co.*, 126 N. C. 370, 78 Am. St. Rep. 663, 35 S. E. 621. Under such a statute, a company is liable for an injury to a young child who strays upon its track, and is injured in consequence of the failure to fence the road: *Rosse v. St. Paul etc. Ry. Co.*, 68 Minn. 216, 64 Am. St. Rep. 472, 71 N. W. 20.

PARISH v. CITY OF ST. PAUL.

[84 Minn. 426, 87 N. W. 1124.]

APPEAL—ASSIGNMENT OF ERROR.—WHERE THERE ARE SEVERAL FINDINGS OF FACT a general assignment of error that the decision is not supported by the evidence is insufficient to call in question the correctness of any particular finding of fact. (p. 375.)

OFFICERS—REMOVAL.—WHERE NO TENURE OF OFFICE IS FIXED BY LAW, and no provision is made for the removal of the incumbent, the power of removal is a necessary incident to the power of appointment. (p. 376.)

OFFICERS—HOW REMOVED.—AN INCUMBENT OF THE OFFICE OF BAILIFF in a municipal court can only be removed by the appointment of his successor in the same way that the incumbent was originally appointed. (pp. 376, 377.)

OFFICERS—APPOINTMENT OF COURT BAILIFFS—POWER OF POLICE DEPARTMENT.—WHERE A COURT ACT provides that court bailiffs shall be appointed by the mayor with the concurrence of the judges, the city police department, which under the city charter has the powers and duties of the mayor under such act, cannot remove or appoint court bailiffs without the concurrence of the judges. (p. 378.)

OFFICERS.—BAILIFFS OF A MUNICIPAL COURT ARE NOT MEMBERS OF THE POLICE DEPARTMENT, for they are appointed for a special service, without reference to their qualifications for service as members of such department. (p. 378.)

James E. Markham and Arthur J. Stobbart, for the appellant.

Oscar Hallam, for the respondents.

427 START, C. J. An action was brought by each of the plaintiffs to recover from the defendant city seventy dollars for salary for the month of August, 1900, as a policeman for special attendance and duty in the municipal court of the city. The pleadings, evidence, and decisions were substantially the same in each case. The trial court made its findings of fact and conclusions of law, ordering judgment for the plaintiff in each case for the amount claimed, and the defendant appealed from an order in each case denying its motion for a new trial. The cases were submitted together in this court, and will be here considered as one case.

The facts found by the trial court, so far as here material, are substantially these: On July 8, 1898, the mayor of defendant city, under and by virtue of the Special Laws of 1889, chapter 351, and particularly section 47 thereof, duly appointed the plaintiff as policeman for special attendance and duty in

the municipal court of the city of St. Paul. The judges of the municipal court thereupon duly approved the appointment. Thereupon the plaintiff duly accepted the appointment, and immediately entered upon the discharge of the duties of the position by virtue of such appointment and approval, and continued to discharge and perform the duties thereof up to and including the whole of the month of August, 1900. During all such time he was duly qualified for such position, and was in all respects eligible to fill and hold the same, and he faithfully performed the duties thereof. The city duly fixed the salary of the plaintiff at the sum of eight hundred and forty dollars per year, to be paid in monthly installments of seventy dollars each. All of plaintiff's salary has been paid by the city except for the month of August, 1900, which has not been paid, although duly demanded.

On August 8, 1900, the board of police of the city, duly appointed under and by virtue of the provisions of the charter of the city adopted by its electors May 1, 1900, by resolution attempted to remove plaintiff from his position, and on the same day, by resolution, attempted to appoint James H. Loomis and R. A. ⁴²⁸ Vance as policemen for special attendance and duty in the municipal court. Neither the attempted removal of plaintiff nor the attempted appointment of James H. Loomis and R. A. Vance, or either of them, was ever approved by the judges of such court and they were never notified of the attempted removal or appointments. The trial court upon these facts found as a conclusion of law, with others, that the plaintiff was, during the month of August, 1900, the lawful incumbent of the position of policeman for special attendance and duty in the municipal court, and entitled to his salary for that month. The defendant makes but one assignment of error, which is this: "The court erred in its order of May 29, 1901, denying defendant's motion for a new trial, on the ground that its decision made and filed herein was not justified by the evidence, and was contrary to law."

As there were several findings of fact, this assignment is insufficient to call in question the correctness of any of them. It only raises the question whether the findings of fact sustain the court's conclusions of law: *Smith v. Kipp*, 49 Minn. 119, 51 N. W. 656; *Mahler v. Merchants' Nat. Bank*, 65 Minn. 37, 67 N. W. 655; *Butler-Ryan Co. v. Silvey*, 70 Minn. 507, 73 N. W. 406, 510. But, inasmuch as no point is made by plaintiff's counsel as to the assignment of error, and counsel on both

sides have discussed the question whether the finding of the trial court that the plaintiff was appointed a policeman for special attendance and duty in the municipal court was sustained by the evidence, we have considered the question.

Our conclusion is, and we so hold, that the finding is sustained by the evidence. It is true that the commission issued by the mayor to one of the plaintiffs, if considered by itself, without reference to the other evidence in the case, particularly the mayor's communication to the judges of the municipal court as to the appointment, is practically conclusive that he was appointed as a policeman. But when the whole evidence upon this question is considered together, it is reasonably clear that each of the plaintiffs was appointed as a policeman for special attendance and ⁴²⁹ duty in the municipal court under the provisions of the municipal court act: Special Laws 1889, c. 351, sec. 47. This section provides: "It shall be the duty of the mayor of said city to see that a sufficient number of police officers are always in attendance upon said court, and in readiness to obey its mandate, and preserve order in its proceedings. And said mayor shall have the power in his discretion to appoint not exceeding three persons, approved by the judges of said municipal court, as policemen for special attendance and duty in said court, irrespective of the general or special rules or legal regulations or enactments relative to the qualifications of policemen; but such persons shall receive the same, but no greater compensation, unless the council directs greater compensation, than ordinary police; . . . provided, however, that nothing herein contained shall affect the powers and duties of the general police in said court."

It is obvious from these provisions that a detail, under the first clause of the statute, of general policemen to be in attendance upon the court, is not the same as an appointment, under the second paragraph thereof, of persons, not exceeding three, to be approved by the judges of the court, as policemen for special attendance and duty in such court. Such detail of general policemen may be changed at the pleasure of the mayor, without the consent of the judges of the court. But persons so appointed and approved are not general policemen, but in fact bailiffs of the court. Nor are they under the control of either the mayor or chief of police, for they are special policemen or bailiffs of the municipal court, subject to its control and direction, and may not be removed at the pleasure of the mayor.

It is true that, where no tenure of office is fixed by law, and no provision is made for the removal of the incumbent, the power of removal is a necessary incident to the power of appointment. But the power of appointment of bailiffs in the municipal court is not exclusively vested by the section of the municipal court act under consideration in the mayor, but it is vested in the mayor and the judges of the court; the one nominates, the other approves, and the act of both is essential to a valid appointment. It follows, as a corollary of this proposition, that an incumbent of the office of bailiff in the municipal court can only be removed by the appointment of his successor in the same way that the incumbent ⁴³⁰ was originally appointed—that is, the mayor may remove such incumbent by appointing his successor; but such appointment does not take effect until approved by the judges, and until then the incumbent is entitled to discharge the duties of the office and receive his salary: *People v. Cazneau*, 20 Cal. 504, 507; *People v. Freese*, 76 Cal. 633, 18 Pac. 12; *Throop on Public Officers*, sec. 447.

We have thus far considered the case without reference to the provisions of the reform charter of the city of St. Paul. Chapter 7, title 3, section 2 of the charter provides, in effect, that all the powers and duties conferred upon the mayor and the police force of the city by the statute (*Special Laws 1889, c. 351, sec. 47*), which we have construed, shall be conferred and imposed upon the police board and police force provided for by the charter. The meaning of this provision is clear. It simply substitutes the police board in place of the mayor in the matter of the appointment of special policemen or bailiffs in the municipal court, and gives to the board the same, and only the same, powers of appointment and removal of such officers as the mayor theretofore possessed.

The charter also provides that the control of the police department of the city shall be vested in the board of police, and that the members of the department shall hold office only during the pleasure of the board: See *State v. City of St. Paul*, 81 Minn. 391, 84 N. W. 127. It is the contention of counsel for the city that the plaintiff is a member of the police department of the city; hence, under this last provision of the charter, he could be removed from his office of policeman for special attendance and duty in the municipal court at the pleasure of the board, without the approval or concurrence of the judges. If this construction of the charter provision be correct, then it

follows that it amends in a material particular the municipal court act, and the question of its constitutionality, raised by plaintiff's counsel, would have to be considered. But such is not the correct construction of this charter provision. It must be construed in connection with the provision of the municipal court act which we have considered; also with the first provision of the charter conferring upon the police board all the duties and powers of the mayor as to the appointment of bailiffs for the municipal court.

431 Now, if the charter provision vesting the control of the police department in the board, and authorizing it to remove its members at the pleasure of the board, had been intended to apply to the appointment and removal of such bailiffs, there would have been no necessity for specially providing that the powers and duties vested in the mayor by the court act should devolve upon the board. When all of these provisions of the charter and court act are read and construed together, it is clear that the charter provisions in no respect modify the court act, except to substitute the board for the mayor as to the appointment of bailiffs. Again, a conclusive answer to the contention of the city is that bailiffs of the municipal court are not members of the police department proper, for they are appointed for a special service, without reference to their qualifications for service as members of such department; and when the term of their special service ends by the appointment and approval of their successors, they cease to be policemen for any purpose. Otherwise, men having none of the legal qualifications entitling them to be appointed as members of the police department might be appointed as policemen or bailiffs for special service in the municipal court, and upon the expiration of the term of such service, become members of the department in violation of the law.

It follows that it was competent for the police board to propose the removal of the plaintiff from his office by appointing his successor, but, until such appointment was approved by the judges of the court, the removal and appointment did not become effective, and until then the plaintiff remained the rightful incumbent of the office, and entitled to his salary.

Order affirmed in each case.

Public Officers.—In the absence of constitutional or legislative prohibition, the power of removal is incident to the power of appointment of officers: *Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686. See, too, *Dubuc v. Voss*, 19 La. Ann. 210, 92 Am. Dec. 526. The removal from an office held during the pleasure of the ap-

pointing power may be either expressed by notification of officer removed or implied by appointment of another to the same office: Commonwealth v. Slifer, 25 Pa. St. 23, 64 Am. Dec. 680. If an officer is appointed for a fixed term, and the power of removal is not expressly declared by law to be discretionary, he cannot be removed except for cause: Hallgren v. Campbell, 82 Mich. 255, 21 Am. St. Rep. 557, 46 N. W. 381.

CHRISTIANSON v. NORWICH UNION FIRE INSURANCE SOCIETY.

[84 Minn. 526, 88 N. W. 16.]

INSURANCE—ARBITRATION.—A BOARD OF REFEREES provided for under a policy of fire insurance to arbitrate a question of loss is a quasi court, subject to the principles governing common-law arbitration. (p. 382.)

INSURANCE — ARBITRATION — EVIDENCE.— WHILE A BOARD TO ARBITRATE a loss by fire is allowed a certain liberality in acquainting itself with the circumstances surrounding the fire without the medium of witnesses, such board cannot seek evidence secretly, and determine the amount of loss by reason of such personal knowledge. (p. 382.)

A BOARD OF FIRE ARBITRATORS MUST CONSTITUTE A BODY OF DISINTERESTED MEN, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy. (p. 382.)

INSURANCE — ARBITRATION — PROFESSIONAL REFEREES.—A person is not bound by an award, where the arbitrators are guilty of misconduct, merely because he consented that professional arbitrators should act. (p. 382.)

ARBITRATION — REAPPRAISEMENT — ESTOPPEL. — Where one party to an award attacks it on the ground of fraud or misconduct of the referees and demands a reappraisal, and the other party determines to abide by the award and refuses to submit to a reappraisal, the latter is thereby estopped from thereafter demanding another appraisal, in case the charges shall prove to be sustained. (p. 383.)

Brown & Kerr and William A. Lancaster, for the appellant.

H. J. Gjertsen, M. H. Boutelle, and Robert Jamison, for the respondent.

527 LEWIS, J. This action is brought by plaintiff to set aside the award of referees, appointed to determine the amount of loss under a fire insurance policy in the defendant company, upon the grounds of fraud and misconduct in their methods of procedure and of the inadequacy of the award.

The trial court returned findings to the effect that the reasonable and fair cash value of the stock of goods and merchan-

dise in plaintiff's possession at the time of the fire was \$29,348.71; that the material entirely destroyed amounted to \$13,777.08, and that the direct loss and damage to the residue of her goods was \$13,021.40, causing plaintiff a total loss and damage of \$26,798.48; that immediately after the fire plaintiff served defendant with due notice thereof, in accordance with the required terms of the policy, and upon failure of agreement by the parties as to the amount of the loss the matter was referred to three appraisers, appointed in the manner provided in the policy by each party submitting to the other a list of three names, from which plaintiff selected W. W. Thomas and defendant Harry A. Titcomb, and the ⁵²⁸ two referees so chosen agreed upon William A. Alden as the third referee—all of Minneapolis; that the referees proceeded to consider and estimate the loss and damage to plaintiff's stock of goods, and from April 30 to May 22, 1900, held various meetings for the purpose of hearing the testimony of witnesses offered by the respective parties, also examining plaintiff's books of account, invoices, vouchers, and other papers, and viewing the premises and the goods partially destroyed by the fire, thereafter determining the sound value of the goods and merchandise on hand at the time of the fire to be \$29,328.71, after which no evidence of any character was received or considered by them as a board, but that Referees Thomas and Alden, acting by themselves, later reconsidered the question, reducing the amount to \$14,302.45, which award, so signed by them, defendant accepted, and has declared itself ready and willing to pay, but which offer plaintiff declined, and on May 24, 1900, formally rejected it by written notice to defendant charging unfairness and misconduct on the part of the referees, and demanding a reappraisement and resubmission of the matter to other referees; that defendant refused its consent to such resubmission, and has at all times insisted upon the validity of the award made by Thomas and Alden, and expressed its willingness and ability to pay that amount.

The court found that Referees Thomas and Alden were not fair, disinterested, and impartial persons, but, on the contrary, were so strongly biased and prejudiced against plaintiff as materially to affect their actions in making up and signing the award; that on different occasions during the progress of their proceedings Referee Thomas had openly declared himself the representative of the insurance company's interests; that Thomas and Alden had privately consulted witnesses concern-

ing the quality and value of plaintiff's stock of goods, thereby materially influencing their action and decision; that they agreed to hear further evidence on plaintiff's behalf, and to notify her of a time and place for that purpose, but found their award without so doing. The court further found that within four months prior to the selection of Referee Thomas he had served in like capacity ⁵²⁹ for other insurance companies, which plaintiff well knew at the time of his selection, and that for a period of seven years preceding he had engaged in numerous appraisements of fire losses as the representative of insurance companies, and was known in their circles as a professional referee on their behalf; that Referee Titeomb, at the time of his selection, and for several years prior thereto, had been actively engaged as an adjuster of fire losses for the assured, and that previous to his selection by defendant he had been in plaintiff's employ preparing proofs of her loss at this fire, which facts were at that time all known to defendant; that Referee Thomas was employed not to exceed seventeen days in this appraisement, and that defendant and the other insurance companies paid him the sum of \$1,015 for his services as such referee.

As a conclusion of law, judgment was ordered that the award submitted by Referees Thomas and Alden be declared void and vacated; that defendant, by reason of its action and conduct since the making and rendition of the award, had waived its right to a resubmission of the matter to other referees; and that plaintiff recover from defendant the full amount of the stated loss, with interest. The assignments of error present two questions: 1. Does the evidence justify the finding of the court as to the amount of goods on hand at the time of the fire, the amount of plaintiff's loss, and the misconduct and prejudice of the referees? 2. As a matter of law, had the defendant waived its rights to a resubmission of the question of loss and damage to other referees?

After an examination of the voluminous record, we are satisfied that the findings of fact are supported by the evidence, and will not enter into a lengthy discussion of that question. As to the cash valuation of the goods on hand at the time of the fire, it is sufficient to say that the court was not limited to any particular method of estimating that value. It was not compelled to take the invoice or cost price alone for a basis, nor the statement made up by any particular expert. Neither was it necessary that the court should find against

respondent because her books were incomplete. The court's finding is based upon evidence from all ⁵³⁰ sources, including the amount of goods usually carried, invoices, and statements of respondent and her bookkeeper and assistants, together with the report of the experts. Tested by the usual methods, the court was justified in its conclusion. Those acts of the referees relied on by respondent as constituting misconduct are detailed in the specific findings of the court, and it is unnecessary to review the evidence in that respect. The record discloses the fact that the proceedings were carried on in substantially the manner stated by the court, and are sufficient to justify the ultimate conclusion of misconduct to such an extent as to invalidate the award.

The board of referees provided for under the standard policy is a quasi court, subject to the principles governing common-law arbitration. Such board should sit in a body, and receive evidence offered by the respective parties, submitting the same to the usual tests of cross-examination. While its individual members are prohibited from privately collecting evidence from different sources, a reasonable latitude is allowed them in the examination of the premises, remnants of goods, and causes of the fire, for the purpose of better understanding and weighing the evidence on the principal question before them, viz., What is the just damage to the property involved? But, while a certain liberality is permissible in acquainting themselves with the circumstances surrounding the fire without the medium of witnesses, such board is not selected for the purpose of seeking evidence secretly, and determining the amount of the loss by reason of such personal knowledge: See authorities cited in 2 Am. & Eng. Ency. of Law, 641-655. This court has practically stated the rule in *Mosness v. German-American Ins. Co.*, 50 Minn. 341, 52 N. W. 932. The referees must constitute a body of disinterested men, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy.

By referring to the findings in this case, it will be seen that the referees did not follow the proper method of discovering facts. They should have accorded respondent every reasonable means of presenting her evidence and appearing in person or by counsel, and, if any referee had privately ascertained the existence of ⁵³¹ evidence bearing upon the case, it was his duty to take the proper steps to have it produced before the board. The result arrived at must be the conclusion of the

board as a whole by their fair and honest consideration of all evidence in the case, and no two of them are privileged to act independently of the third at times and places unknown to him.

It is asserted on behalf of appellant that the referees were selected with full knowledge by each party that both Thomas and Titcomb had similarly served before, and in fact were chosen for the value their experience might afford the respective interests in this case, and that, whatever the misconduct or illegality resorted to by them, it was nothing more than might have been contemplated. While true that these men were experienced in work of this particular kind, it cannot be said that they were chosen with the expectation by the parties of their becoming their respective advocates. There is nothing in either the evidence or findings of the court to indicate that either appellant or respondent desired the referees to go beyond the legitimate limits of the inquiry. Consequently, there is no application here of the rule sometimes applied that parties are bound by the result when it appears they voluntarily selected referees with the expectation of their accomplishing certain results by unjust means.

The principal question in this case is one of law. Conceding that appellant was in no way connected with the referees' misconduct for which the award was declared invalid, is appellant entitled to a resubmission? Appellant takes the position that it was in no manner responsible for the referees' misconduct, and, the award having been declared invalid, the parties are in the same position they were in before commencement of suit, and that the judgment setting aside the award has the effect of annulling it. We are referred to a certain line of cases in support of this proposition—cases which have held that, where an attempt has been made, but for some reason arbitration has not taken place, a new arbitration is necessary—but they are not applicable here.

Respondent refers to the case of *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 149, 68 N. W. 855, as an authority for the insured to commence ⁵³² action against defendant to recover the amount of the loss when the award has been obtained by misconduct on the part of the referees, irrespective of the insurer's connection with such fraud. In that case the court did not base its decision upon the fact that the defendant company was connected with the fraud of the referees, but held that the insurer was not entitled to a resubmission to another board of arbitration, for the reason that by its conduct it had

waived such right by not suggesting a new appraisalment, and in expressly insisting upon the award as made, and notifying the insured that any claim under the policy must be upon the basis of that award, and no other. In the answer in that case defendant made no suggestion of a reappraisalment, but insisted from first to last upon the validity of the award; whereas in the case before us appellant, in its answer, after denying the allegations of the complaint as to the invalidity of the award, asserted that it was valid and binding, yet alleged that, if such award should be declared invalid, then that the question should be resubmitted. The demand for resubmission was conditioned upon the result of the action, and was of no importance.

In our opinion, the Levine case lays down a sound principle, and one which is controlling in this case, which is to the effect that, if an award is attacked upon the ground of fraud or misconduct of the referees, and one party to the controversy notifies the other of that fact, demanding a reappraisalment on account of such misconduct, it then becomes the duty of the other party to investigate the validity of the charges, and determine whether or not it will abide by the award or submit to a reappraisalment; and, if it shall determine to abide by the award and refuse to submit to a reappraisalment, such party is thereby estopped from thereafter demanding another appraisalment, in case the charges shall prove to be sustained. The purpose of the provisions in the standard policy with reference to arbitration is to secure a speedy determination of the controversy, and to hold that the party insisting upon the validity of an award might litigate that question and not be bound by the result of the action, would be to create an interminable method by which the controversy could be submitted again and again. When a party to a controversy ⁵³³ makes a charge of fraud or misconduct on the part of referees, and notifies the other, such party is not required to elect between two inconsistent remedies, and the cases relied upon by appellant—*Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005, and *In re Van Norman*, 41 Minn. 494, 43 N. W. 334—are not in point.

The conclusion we have arrived at does not result in a discrimination against the insurance companies, for the same principle would apply to the actions of the insured in case the insurer should attack the award for the same reason.

Order affirmed.

Agreements to Submit to Arbitration are discussed in the monographic note to Commercial Union Assur. Co. v. Hocking, 2 Am. St. Rep. 566-572. Parties are not bound to submit to an appraisal by interested or otherwise incompetent persons: Western Assur. Co. v. Hall, 120 Ala. 547, 74 Am. St. Rep. 48, 24 South. 936. And misconduct on the part of arbitrators invalidates their award: Moshier v. Shear, 102 Ill. 169, 40 Am. Rep. 573; note to Brush v. Fisher, 14 Am. St. Rep. 518. See, in this connection, Vega Steamship Co. v. Consolidated Elevator Co., 75 Minn. 308, 74 Am. St. Rep. 484, 77 N. W. 973. If either party in bad faith prevents an appraisal by refusing to proceed, or by insisting on the selection of improper arbitrators, or by undue interference with them after selection, the other party is absolved from further obligation to arbitrate: Western Assur. Co. v. Hall, 120 Ala. 547, 74 Am. St. Rep. 48, 24 South. 936. And when arbitration is made a condition precedent to the right of action on a fire insurance policy, and the award is repudiated by the insured, as invalid, but without fault of the insurer, the insured cannot, without showing a new reference or an excuse therefor, maintain an action to recover damages irrespective of the amount of the award: Fisher v. Merchants' Ins. Co., 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282. Either party to an agreement to arbitrate a difference concerning an insurance loss, who intentionally prevents or unreasonably delays the adjustment of their rights, is not permitted to plead failure to arbitrate as a defense to an action subsequently brought on the policy: Read v. State Ins. Co., 103 Iowa, 307, 64 Am. St. Rep. 180, 72 N. W. 665.

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CASES
IN THE
SUPREME COURT
OF
MONTANA.

PARROT SILVER AND COPPER COMPANY v. HEINZE.

[25 Mont. 139, 64 Pac. 326.]

INJUNCTION—DISCRETION IN GRANTING.—The granting of a preliminary injunction is so largely a matter of discretion that it will be sustained upon appeal, where there has been a reasonable showing made in support of the application in the court below. (p. 388.)

MINES—EXTRALATERAL RIGHTS.—WHERE A VEIN ON ITS COURSE CROSSES TWO OPPOSITE SIDE LINES, the vein cannot be followed, either on its dip or strike, beyond vertical planes drawn through the side-end lines, and the angle at which it crosses these side lines makes no difference in the application of the principle. (p. 389.)

MINES—EXTRALATERAL RIGHTS.—WHERE THE APEX of a vein passes through one of the parallel end lines and a side line, the extralateral rights are bounded by the vertical plane of such end line and a parallel plane passing downward through the point where the apex crosses the side line. (p. 389.)

MINING CLAIM—RIGHT TO VEIN UNDER SURFACE.—A patentee of the United States may assert title to the part of a vein beneath the surface of his claim, when the extralateral rights of others do not extend thereto, although the apex lies within another claim. (p. 390.)

MINERAL LAND—GRANT OF.—UNDER THE COMMON-LAW RULE, as adopted in this country, a grant of mineral lands without reservation conveys all rights above and beneath the surface, usque ad coelum et ad orcum. (p. 390.)

MINERAL LAND.—A GRANT FROM THE UNITED STATES under the laws regulating the disposition of mineral lands differs from a common-law grant only in that it may carry extralateral rights, and is subject to the extralateral rights of neighboring locators. (pp. 390, 392.)

MINING CLAIM—RELATIVE RIGHTS OF CLAIMANTS.—Under the United States statutes it is only the locator, his successor, or a patentee who has any right to follow a vein into the boundaries of an adjoining owner, and the latter, holding under a location or patent, is prima facie entitled to everything beneath

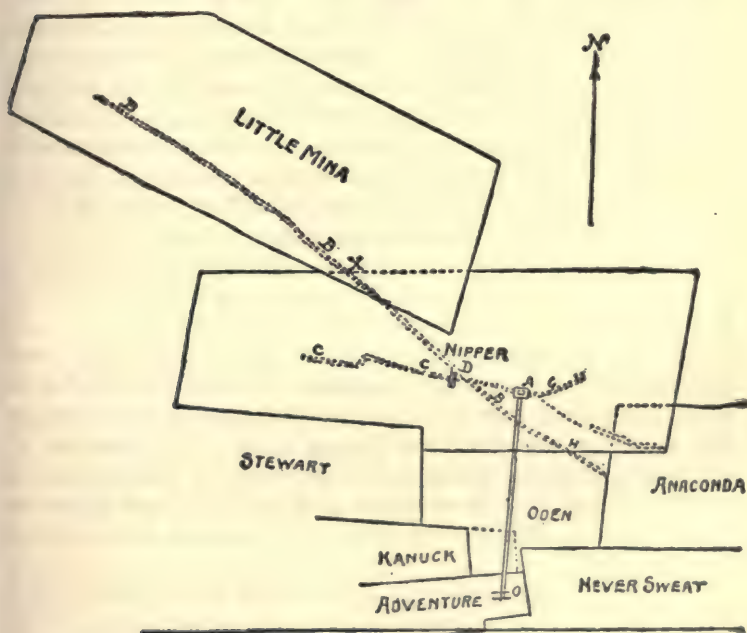
the surface. He can assert this title to prevent intrusion by one who cannot show that he comes with the right acquired by a compliance with the statutes. (p. 393.)

McHatton & Cotter and J. M. Denny, for the appellants.

William Scallon, T. B. Walsh, and J. K. McDonald, for the respondent.

141 BRANTLY, C. J. Action in the nature of ejectment to determine the title to certain openings and ore bodies beneath the surface of the Adventure mining claim, situate in Silver Bow county. The plaintiff, upon filing the complaint, asked for an injunction pendente lite to restrain defendants from removing the ores in question. From an order granting the injunction the defendants have appealed.

The principal question presented by the appeal can best be understood by reference to the subjoined diagram, which illustrates the contentions of the parties:



The plaintiff is the owner of the Adventure claim, with all the rights conferred by a patent thereto from the United States. The defendant F. Augustus Heinze is the owner of thirty-one undivided thirty-sixths of the Nipper claim, also

patented, lying to the north. When this controversy arose, the defendant Arthur P. Heinze was in possession of the Nipper claim as lessee of the interest of F. Augustus Heinze, and was engaged ¹⁴² in mining and extracting ore at the point "O," beneath the surface and within the vertical planes passing downward through the boundaries of the Adventure claim. These operations were conducted through a "working winze" descending into the earth from the surface within the boundaries of the Nipper claim at "A," and following the vein on its dip to the south at an angle of about seventy-five degrees through the intervening country to the point "O," at a depth of thirteen hundred feet below the surface. The plaintiff admits that the ore bodies at this point have their apex in the Nipper claim, but contends that the evidence shows that this apex, instead of crossing the end lines of the Nipper claim, follows the course indicated by the line "B, B, B," passing across the north side line of the Nipper into the Little Mina at "X," toward the northwest, and through the south side line into the Oden claim at "H," and thence across the east end line of the Oden into the Anaconda, toward the southeast. This being the condition of the vein, it is confidently asserted that the Nipper claim has no extralateral rights, and that, therefore, since none of the intervening claims have any part of the apex, so as to give them extralateral rights, the ore bodies in controversy belong to the plaintiff by virtue of what counsel assert are its common-law rights.

Defendants on their part contend that the evidence shows that the apex of the vein, as demonstrated by developments at and beneath the surface within the boundaries of the Nipper claim, follows the general direction of the side lines from near the west end line, through the point of discovery at "D," and crosses the south side line into the Anaconda at a point near the southeast corner of the Nipper claim. The position of the vein under this contention is indicated by the letters "C, C, C." There is some evidence to show that there is also a branch of this vein passing off in the direction indicated by the letter "G."

There is a sharp conflict in the evidence introduced to support these adverse contentions as to the strike of the vein. The district court issued the injunction after a hearing. It is evident, from the situation as illustrated by the diagram, that that ¹⁴³ court found in favor of plaintiff's contention. Otherwise, its action cannot be justified upon any reasonable

theory; for, if the theory of the defendants is correct, it is clear that, in following the vein on its dip, they are merely asserting their extralateral rights granted under their patent, though in doing so they pass entirely through the adjoining claims on the south and enter plaintiff's claim.

Upon the evidence submitted, the district court might have found in favor of defendants' contention; as it did not, however, and as there is substantial evidence tending directly to support plaintiff's contention, we do not feel justified in holding that the showing made by plaintiff was not reasonable, or that the court abused its discretion in finding as it did. The rule heretofore applied by this court in this class of cases is that the granting of a preliminary injunction is so largely a matter of discretion that it will be sustained, upon appeal, where there has been a reasonable showing made in support of the application in the court below: *Anaconda Copper Min. Co. v. Butte etc. Min. Co.*, 17 Mont. 519, 43 Pac. 924; *Montana Ore Purchasing Co. v. Boston etc. Min. Co.*, 20 Mont. 528, 52 Pac. 273; *Butte etc. Min. Co. v. Montana Ore Purchasing Co.*, 21 Mont. 539, 52 Pac. 375; *Montana Ore Purchasing Co. v. Boston etc. Min. Co.*, 22 Mont. 159, 56 Pac. 120. For present purposes, therefore, we shall assume the finding in favor of plaintiff as to the course of the vein through the Nipper claim to be correct, and proceed to determine the legal question presented upon this theory of the case.

From this point of view it is apparent that the apex of the vein, in its course through the Nipper claim, crosses both side lines. The defendants, therefore, have no right to follow the vein on its dip in the direction of the Adventure claim. The supposed side lines of the Nipper claim are in fact end lines, and whatever rights its owners have to follow the vein in the direction of the Adventure are limited by a vertical plane passing downward through the south side line extended in its own ¹⁴⁴ direction toward the west. "It may be considered as absolutely and finally settled that, where a vein on its course crosses two opposite side lines, the vein cannot be followed, either on its dip or strike, beyond vertical planes drawn through the side-end lines, and that the angle at which it crosses these side lines makes no difference in the application of the principle": 2 Lindley on Mines, sec. 588. This is a concise statement of the present condition of the law upon this subject as declared by the supreme court of the United States in *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463,

in *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, in *Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. Rep. 1356, in *King v. Amy etc. Min. Co.*, 152 U. S. 222, 14 Sup. Ct. Rep. 510, and in *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 15 Sup. Ct. Rep. 733; and the question as to what are the extralateral rights of the owner of a claim in which the apex is situated as in the Nipper is not now open to further discussion.

It is equally as well settled by the adjudicated cases that the extralateral rights of the owners of the Oden claim, lying to the south between the Nipper and the Adventure, if they have any at all upon the vein in question, are limited toward the west by a vertical plane passing downward through the point "H," and parallel with the east end line of that claim. Assuming that the end lines of the Oden are parallel, a condition is presented which was considered by this court in *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273, and the conclusion there stated is that, where the apex of the vein passes through one of the parallel end lines and a side line, the extralateral rights are bounded by the vertical plane of such end line and a parallel plane passing downward through the point where the apex crosses the side line. This case was affirmed on appeal by the supreme court of the United States (171 U. S. 92, 18 Sup. Ct. Rep. 941) upon the authority of *Del Monte Min. etc. Co. v. Last* ¹⁴⁵ *Chance Min. etc. Co.*, 171 U. S. 55, 18 Sup. Ct. Rep. 895, decided on the same day. If the end lines are not parallel, the owners of the claim have no extralateral rights.

It thus appears that neither the owners of the Nipper nor of the Oden have, by virtue of their title to the portion of the apex within their respective boundaries, the right to follow the vein on its dip into the ground underlying the Adventure; in other words, these claims have no extralateral rights in the direction of the Adventure.

The question presented for determination upon this condition of affairs may therefore be stated thus: Assuming that the apex of the vein from which the appellants are extracting ore beneath the Adventure surface is in the Nipper ground, and that the vein in its strike crosses both of the side lines of the Nipper, so that the owners of the Nipper may not follow the vein on its dip to the south, can the plaintiff, who owns the Adventure claim, successfully assert title to the ore in that part of the vein beneath its surface and within the planes

of its exterior boundaries? The defendants insist that it cannot do so, because, not having the top or apex of the vein within the exterior boundaries of the Adventure claim, it has no title to the part of the vein lying under the surface, notwithstanding defendants have no title thereto. In other words, this part of the vein was not granted to the plaintiff by its patent, and therefore the defendants, though without title themselves, commit no wrong upon plaintiff in entering beneath the surface and taking away ores to which it has no title. This contention has no foundation either in law or reason. Under the common-law rule as adopted in this country, a grant of lands without specific reservation conveys all rights above and beneath the surface, *usque ad coelum et ad orcum*. It is not uncommon, however, for such conveyances to make reservations of rights both above and below the surface, and the fact that this is true in a particular case in no way affects the validity of the particular conveyance.

In what respect does a grant from the United States under ¹⁴⁶ the laws regulating the disposition of mineral lands differ from a common-law grant? To reach a solution of this question, regard must be had to the statute itself. Section 2322 of the Revised Statutes of the United States provides: "The locators of all mining locations heretofore made, or which shall hereafter be made, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." If this section stood alone, it would seem to restrict the rights of the locator to the use and enjoyment of the surface only for the purpose of following

the vein upon its strike and dip under the prescribed limitations as to adjoining lands. Reading this in connection with the other provisions of the chapter, however, we find that it is "lands valuable for minerals" which are reserved from sale except as otherwise directed; it is "lands" in which the deposits are found which are open to occupation and purchase; it is "land claimed and located for valuable deposits" for which the patent may be obtained; and it is by virtue of the title secured to land that the purchaser obtains any right whatever with reference to mineral deposits therein. Upon a valid location of a definite portion of land is founded the right of possession. The patent grants the fee, not to the ¹⁴⁷ surface and ledge only, but to the land containing the apex of the ledge. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines, is expansion of the rights which would be conferred by a common-law grant. On the other hand, this grant is subject to the right of an adjoining locator to follow his vein upon its course downward beneath the surface included in the grant. In these two respects only do the rights conferred by the statute differ from those held under a common-law grant. "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at the common law": *Doe v. Waterloo Min. Co.*, 54 Fed. 935; *Leadville Min. Co. v. Fitzgerald*, 4 Mor. Min. Rep. 385, Fed. Cas. No. 8158.

The passage quoted from the opinion of Judge Ross in *Doe v. Waterloo Min. Co.*, 54 Fed. 935, is directly in accord with the view expressed by the supreme court of Dakota in *Duggan v. Davey*, 4 Dak. 110, 26 N. W. 887, as well as with the result of *King v. Amy etc. Min. Co.*, 152 U. S. 222, 14 Sup. Ct. Rep. 510. In the latter case the defendant was the owner of the Amy claim. The plaintiff and the defendant were tenants in common in the Nonconsolidated claim, having a common boundary with the Amy on the north. The apex of the vein in the Amy crossed both side lines and passed into the Nonconsolidated across the common boundary. The defendant had taken a large amount of ore from within that portion of the Nonconsolidated east of a plane passing downward through a line parallel with the end lines of the Amy at the point where the vein passed into the Nonconsolidated. This court (*King v.*

Amy etc. Min. Co., 9 Mont. 543, 24 Pac. 200) held that this ore belonged to the defendant by virtue of its right to follow the vein on its dip toward the north. Upon appeal the supreme court of the United States reversed the judgment of this court, holding that the side lines of the Amy were its end lines, that the extralateral rights of the defendant ¹⁴⁸ toward the north were limited by the vertical plane of the north side line; and that the plaintiff, in addition to a decree of partition demanded as the principal relief, was entitled to an accounting for the ores in controversy. By reference to the diagram in the opinion in *King v. Amy etc. Min. Co.*, 9 Mont. 569, 24 Pac. 201, it will be seen that the apex of the part of the vein to which the ore in controversy belonged was not in the Nonconsolidated, but in the Amy claim; and upon no other theory can the judgment of the supreme court of the United States be justified than that the owners of the Nonconsolidated were entitled to the ore by virtue of the common-law right under their patent. The same may be said of the result of the judgment in *Iron Silver Min. Co. v. Elgin Min. etc. Co.*, 118 U. S. 196, 6 Sup. Ct. Rep. 1177, where similar conditions existed as to the apex of the ore in controversy.

Under the provisions of the statute, as they have been construed by these and the other cases heretofore cited, it is only the locator, or his successor, or a patentee, who has any right to follow a vein into the boundaries of an adjoining owner, and the latter, holding under a location or patent, is *prima facie* entitled to everything beneath his surface. He may assert this *prima facie* title to prevent intrusion by anyone who cannot show that he comes with the right acquired by a compliance with the provisions of the statute. This conclusion is also in accord with the spirit of all the statutes regulating the disposition of the public lands, which make it manifest that it is the policy of the government to grant every right therein, except where express reservation is made.

Defendants cite and rely upon *Montana Co. v. Clark*, 42 Fed. 626, and *Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726, as conclusive of their contention. It is true that in *Montana Co. v. Clark*, 42 Fed. 626, Judge Knowles reached a conclusion directly contrary to that here stated, but that case is contrary to all the authorities so far as we are advised, and does not meet with our approval. The case of *Driscoll v. Dunwoody*, 7 Mont. 394, 16 Pac. 726, is not pertinent, as it

does not deal with any phase of the question involved in the case at bar.

¹⁴⁹ The hearing in the court below was upon oral evidence and affidavits. Objection was made by defendants to the introduction of two of the affidavits offered by plaintiff, on the ground that they were immaterial and incompetent. The objection was overruled. Defendants allege error. We have examined the affidavits in question, and conclude that the court committed no prejudicial error in admitting and considering them. One of them was immaterial, but it is apparent that, if it had been excluded, the result would not have been different.

The order of the district court is affirmed.

The Granting of an Injunction rests within the sound discretion of the trial court, and its action cannot be disturbed in the absence of clear proof of an abuse of such discretion: *Grey v. Mayor etc.*, 60 N. J. Eq. 385, 83 Am. St. Rep. 642, 45 Atl. 994; *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154.

Mines—Extralateral Rights.—A patentee of a mining claim has the right respecting any lode, the apex of which is within the lines of his location, to follow such lode downward on its dip beyond the side lines of his claim: See the monographic notes to *Catron v. Old*, 58 Am. St. Rep. 265; *McClintock v. Bryden*, 63 Am. Dec. 108. But if the apex of the vein passes through one of the parallel end lines and a side line, the extralateral rights are bounded by the vertical plane of such end line and a parallel plane passing downward through the point where the apex crosses the side line: *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273. See, in this connection, *Argonaut Min. Co. v. Kennedy Min. etc. Co.*, 131 Cal. 15, 82 Am. St. Rep. 317, 63 Pac. 148; *Butte etc. Min. Co. v. Societe Anonyme des Mines*, 23 Mont. 177, 75 Am. St. Rep. 505, 58 Pac. 111. On cross or intersecting lodes, consult the note to *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 83 Am. St. Rep. 41-44. On what is included in patents for mineral lands, see the monographic note to *Catron v. Old*, 58 Am. St. Rep. 263-280.

McKAY v. McDougall.

[25 Mont. 258, 64 Pac. 669.]

MINING CLAIM—ABANDONMENT AND FORFEITURE.—AN INSTRUCTION that a location of a placer claim on ground already located is a nullity, unless the jury believe from the evidence that the prior locator had abandoned the claim without any intention to return, is erroneous. It excludes the question of forfeiture. (p. 397.)

MINING CLAIM.—AN ABANDONMENT of a mining claim takes place when the locator voluntarily leaves it to be appropriated by the next comer, without any intention to claim it again, and regardless of what may become of it in the future. (p. 397.)

MINING CLAIMS.—A FORFEITURE of a mining claim takes place by operation of law, without regard to the intention of the locator, whenever he neglects to make the required annual expenditure on the claim within the time allowed. (p. 397.)

MINING CLAIM—DISCOVERY AND LOCATION.—In the absence of a state statute or a local rule or custom, a compliance with the statutes of the United States as to the discovery and marking the boundaries of a placer claim is sufficient. (pp. 398, 399.)

MINING CLAIM—LOCATION.—IT IS FOR THE JURY to say whether the evidence shows a valid location of a mining claim. (p. 399.)

MINING CLAIM.—THE QUESTION OF FORFEITURE of a mining claim is for the jury, upon the evidence. (p. 399.)

MINING CLAIM—FORFEITURE.—WORK MAY BE RESUMED on a mining claim after the initiation of a second location, so as to save the forfeiture. (p. 401.)

MINING CLAIM.—THE TERM "LOCATION," in Montana, comprehends all the several steps necessary to make a complete location, and does not mean the initiation of a location by entry and performance of the first necessary step. (p. 401.)

MINING CLAIM—FORFEITURE.—IT IS ONLY BY A COMPLETE RELOCATION after default of the first locator that a forfeiture of a mining claim is wrought. (p. 402.)

MINING CLAIM—RELOCATION—EVIDENCE.—Where the plaintiff located a placer claim on ground already located by a third person, and subsequently the defendant located the same ground, but his notice being defective he filed an amended one, and meanwhile the plaintiff had resumed work, the amended notice is admissible in an action to determine the conflicting rights, upon the theory that if the location of the third person was valid when the plaintiff's was made, the latter was void, in which event the defendant's title would be good. (pp. 402, 403.)

Lew L. Callaway, for the appellant.

W. A. Clark, for the respondent.

259 BRANTLY, C. J. Action by plaintiff for damages for alleged trespasses upon the Shoo Fly Gulch placer claim, situate in Madison county, for a perpetual injunction restraining

defendant from further trespassing thereon, and for a decree quieting plaintiff's title. The defendant denies plaintiff's title, sets up a counterclaim alleging title in himself, and demands judgment for damages and for injunction.

The opinion rendered on a former appeal, reversing a judgment in favor of the defendant herein and remanding the cause, is reported in *McKay v. McDougall*, 19 Mont. 488, 48 Pac. 988. The pleadings having been amended to conform to the suggestions made by this court in that opinion, a trial was had upon the ²⁶⁰ merits, resulting in a verdict for the defendant for eighteen hundred dollars. Judgment was entered for this amount and for costs, and also perpetually enjoining the plaintiff from asserting any claim to the ground in controversy. From this judgment and an order denying a motion for a new trial, plaintiff has appealed.

At the trial the plaintiff rested his claim of title upon a location of the ground in controversy as the Shoo Fly Gulch placer claim, made by himself and one Thurgood in July, 1877. A notice or declaratory statement of this location was filed for record with the clerk of Madison county on July 22d. It was signed by both locators, but was not verified. Plaintiff thereafter, by mesne conveyances, acquired Thurgood's interest. The defendant, denying any title in plaintiff, claimed title under a location called the "Humbug Placer," made on July 22, 1893, a notice of which was recorded on August 9, 1893, and an amended location made on September 1, 1894. The three contentions made at the trial were upon the questions whether the ground in controversy was subject to location at the time plaintiff's location was made, whether the plaintiff had failed to represent the Shoo Fly Gulch claim during the year 1892, and whether the plaintiff resumed work before defendant located the ground as the Humbug Placer, either by what he did on the ground in 1893, or by his amended location made in 1894. All these questions were fairly within the issues made by the pleadings, as appears from a synopsis of them set out in the statement preceding the opinion on the former appeal, and the integrity of the judgment of the district court turns upon the correctness of the instructions submitted to the jury upon these issues.

1. Evidence was introduced tending to show that the ground in controversy was located as a placer claim by one Sholes and others in June, 1876. Sholes himself, who testified in the case, stated that he saw the plaintiff upon the ground early

in 1877, but that as his time had not expired he was not uneasy. In another place in his testimony he says that while he and his associates worked in the neighboring gulches until 1880, when ²⁶¹ he sold out, they never did any work upon the ground claimed by plaintiff in the way of mining, except "to represent the gulch." From other evidence in the case it appeared that there was not water enough in the gulch for mining purposes, and that all the work done there subsequently was by means of water brought in from other sources. There was also some evidence from which it might be inferred that work had been done upon the ground in 1869, but that none had been done thereafter until plaintiff made his location. There is no other evidence in the record that Sholes and his associates did any work upon the claim at any time after the date of their location. Upon this evidence the court, after stating correctly to the jury the steps necessary to make a valid location of a placer claim in 1876, instructed them as follows: "And if you find from the evidence that the said Clark M. Sholes and his associates in June, 1876, did make a discovery of placer gold on the unoccupied lands of the United States, and on the premises in controversy, and did make a location thereof, and mark the boundaries thereof so that they could be readily traced, then the court instructs you that as a matter of law the said Sholes and his associates were the owners of, and entitled to the possession of, said claim against all the world, and were in law in possession thereof, so long as they complied with the laws of the United States; and any location placed thereon or attempted to be put upon said premises by the plaintiff while such prior location was valid and subsisting was a nullity and conferred no rights upon plaintiff, and he would be a trespasser, under the law, unless you further believe from the evidence that the said Clark M. Sholes and his associates abandoned said placer claim and left the same without any intention of returning thereto prior to July, 1877, when the plaintiff, McKay, claims to have made his location thereof." Upon the facts in evidence before the jury upon this branch of the case, this instruction was clearly misleading. For, while failure to represent a mining claim, with other facts showing intention, may leave room for an inference of abandonment by the locator, ²⁶² there may be a forfeiture of all right by the mere failure where the intention to abandon does not exist. Abandonment, as applied to mining claims held by location merely, takes place only when

the locator voluntarily leaves his claim to be appropriated by the next comer, without any intention to retake or claim it again, and regardless of what may become of it in the future. A forfeiture takes place by operation of law, without regard to the intention of the appropriator, whenever he neglects to preserve his right by complying with the conditions imposed by law; that is, to make the required annual expenditures upon the claim within the time allowed. The former involves an inquiry of fact as to the intention as well as the act; in regard to the latter the inquiry is: Has the required expenditure been made as the law commands? We are of the opinion that while there is, perhaps, sufficient evidence upon which to base an inference that Sholes and his associates had abandoned their claim at the time plaintiff's location was made, the question whether they had forfeited their rights by failure to represent the claim before that time was also fairly presented, and should have been submitted to the jury under proper instructions. The paragraph quoted is correct upon the question of abandonment, this term being clearly defined in a following paragraph; but it should have gone further, and submitted, also, the question of forfeiture. The logical effect of it is to exclude this question from the consideration of the jury altogether. In this connection the court should also have laid down the correct rule as to the time within which Sholes and his associates were obliged to do their annual representation work in order to save a forfeiture. Under the act of Congress of May 10, 1872 (17 Stats. at Large, p. 92, sec. 5), the year within which the required expenditure must be made upon all claims theretofore or thereafter located was computed from the date of the respective locations. As to claims located prior to the passage of that act the rule was changed by acts of Congress of March 1, 1873, and June 6, 1874, respectively (17 Stats. at Large, 483; 18 Stats. at Large, 61), so that after January 1, ²⁶³ 1875, the year was computed from the first day of January in each year. As to claims located after May 10, 1872, the rule remained as provided in the act of that date until the act of Congress of January 22, 1880 (21 Stats. at Large, 61), which so amended the act of May 10, 1872, as to permit the time of representation to be computed from the first day of January "succeeding the date of location," and the provision was made applicable to all claims, whether located before or after the amending act: *Lindley on Mines*, sec. 621; *Hall v. Hale*, 8 Colo.

351, 8 Pac. 580; *Belk v. Meagher*, 104 U. S. 279. The court having already, in another paragraph of the instructions, laid down the rule correctly as to when the representation should have been done by the plaintiff in order to prevent a forfeiture in 1892, the jury, in the absence of the specific instruction as to the rule applicable in 1876-77, were doubtless led to infer that the same rule applied in both cases. Under this view the jury might well conclude that the location made by plaintiff in July, 1877, was void from the beginning, because it was made on land still subject to the claim of Sholes and his associates, whereas, from the evidence, and under a proper instruction, they might have reached the conclusion that the Sholes location was forfeited for want of representation prior to the end of June, 1877.

In what we have just said with reference to the Sholes location we have proceeded upon the assumption that there was evidence enough to go to the jury upon the question whether the acts done upon the ground by Sholes and his associates in June, 1876, made it a valid location. At that time the statute of the territory of Montana requiring a record of a verified notice or declaratory statement of location did not include placer claims. It applied only to lode locations until the passage of the act of March 5, 1883 (Sess. Laws 1883, p. 95), which was amendatory of the Revised Statutes of 1879, and made all locations subject to the same rule. In the absence of a statute making additional requirements, or a local rule or custom (and none was proven in this case), a compliance with the statutes ²⁶⁴ of the United States as to discovery and marking of the boundaries was sufficient. It was for the jury to say whether the evidence showed such a compliance, though the monuments put upon the ground to indicate the exterior boundaries were few and placed at great intervals. The court could not say, as a matter of law, that the facts did not show a valid location.

2. It was also a question for the jury, upon the evidence, whether the plaintiff had suffered a forfeiture of his rights by a failure to represent his claim in 1892, as well as whether he had resumed work in good faith before the Humbug Placer was located. The plaintiff contends that it is shown by uncontradicted evidence that he did several hundred dollars' worth of work on his claim in 1892. He also asserts that, if it be conceded that he did no work at all during that year, yet there is no controversy but that the evidence shows that

he resumed work in good faith before the defendant made any location. As to work done in 1892 plaintiff's position is sustained by his own testimony; on the other hand, the testimony of the defendant tends to show that plaintiff did no work at all, but that the excavation and removal of dirt from the gulch, which plaintiff claims to have done by the use of water from a ditch passing round the head of the gulch to other claims, was done by waste water from this ditch or by a cloudburst long before 1892, and that plaintiff had nothing whatever to do with it. There was thus a direct and substantial conflict in their statements. There is, however, no substantial conflict in the evidence introduced by the plaintiff to show that he did a large amount of work upon the claim in 1893, after the defendant entered thereon, and during 1894, prior to September 1st. Indeed, a considerable portion of the judgment recovered by the defendant was for gold taken out by the plaintiff between July 22, 1893, and September 1, 1894, the date of defendant's amended location. The facts connected with defendant's location are that he entered upon the land in July, 1893. Having found gold, he marked the boundaries of his claim running up the gulch with monuments, which the jury evidently found ²⁶⁵ sufficient to identify the claim. Thereupon he filed his notice for record with the county clerk, but it was not verified as required by the statute, and was defective in other particulars. After this suit was begun by plaintiff, and after plaintiff had commenced to "work the mine thoroughly," as he says, the defendant filed his amended notice of location. This amended notice was sufficient in substance, and would, in the absence of any other rights, establish defendant's title to the Humbug Placer. The question, therefore, is: Did plaintiff's resumption of work, and its continuance thereafter, prevent a forfeiture in favor of the defendant's location initiated before a resumption of work, but not completed until some fourteen months after? The trial court was of the opinion that it did not, as appears from the following instruction submitted to the jury upon this branch of the case: "The court instructs the jury that, in order to prevent a forfeiture for failure to perform assessment work required by law, the claimant must resume in good faith, and prosecute the same continuously and without unreasonable interruption until the full amount of labor is performed. Nothing less than the outward manifestation of intent to atone for the delinquency by diligent continuous prosecution of substantial and valuable development work will

satisfy the law; that, while the claim will be protected from relocation so long as the claimant is actually engaged in making up the deficiencies, a suspension of work for any appreciable period before the full amount required has been performed will subject the claim to relocation, and the right to resume work is lost, where a qualified relocater enters and initiates a location, and a resumption of work upon a claim between the initiatory and final acts of relocation is of no avail. And if you believe from the evidence in this case that the plaintiff had failed to represent said placer claim for the year 1892, and that the defendant entered upon said premises and proceeded to initiate a relocation thereof prior to the plaintiff commencing work, then any work done by the plaintiff after the initiation of said relocation will not avail him or save his rights in the premises, ²⁶⁶ and you must find for the defendant." This paragraph, except the last sentence, is taken from the text of Mr. Lindley, on pages 825, 826. While we agree that it states the law correctly as to good faith and diligence in the prosecution of the work after resumption, we dissent from this learned author's view that work may not be resumed after the entry of the relocater and the initiation of the second location, so as to save the forfeiture. Whatever may be the rule in other jurisdictions, under local statutes requiring work of considerable amount to be done by the relocater in order to complete his relocation, which is also the case under our present statute (Pol. Code, sec. 3615), the rule applicable under the statute in force in this state until July 1, 1895 (Comp. Stats. 1887, div. 5, sec. 1477), is stated in *Gonu v. Russell*, 3 Mont. 358, as follows: "The law contemplates that the location of a mining claim shall consist of a number of distinct acts, which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists. The owner of the lode which has become subject to relocation can resume work thereon at any time prior to the performance of all these acts. The appellant could not make a valid location of the Empire lode until he had marked the boundaries so that they could be traced readily by means of stakes, monuments, natural objects, or any other certain means. The resumption of labor in good faith by the respondent before the appellant perfected his location rendered null the prior acts of the appellant." The rule as thus stated necessarily results from the signification given to the term "location" used in the statute: U. S. Rev. Stats.,

sec. 2324. The territorial supreme court understood it in its broadest sense, comprehending all the several steps necessary to make a complete location. Under the rule adopted by other courts, and as stated by Mr. Lindley, *supra*, the term is held to mean the initiation of a location by entry and performance of the first necessary step. While there is much to be said in favor of this latter view, the argument is not so overwhelming that we feel justified in departing from the rule as laid down in *Gonu v. Russell*, 3 Mont. 358.

267 In the first paragraph of this opinion we spoke generally of a forfeiture as the result of a default on the part of the first locator. Speaking accurately, it is only by a complete relocation by another after default of the first locator that a forfeiture is wrought. This statement is fully in accord with Mr. Lindley's view in his text, at page 820, and it is the only logical view. It will not be contended that if A, for example, enters upon a claim located by B, which is subject to forfeiture, with the intention to relocate it, and takes one or more of the necessary steps to that end, but abandons his purpose before he completes the relocation, B's rights will be thus effectually forfeited. If Congress had intended this, the idea would doubtless have been expressed by use of some other term less comprehensive in meaning than the term "location." The rule as stated in *Gonu v. Russell*, 3 Mont. 358, is therefore logical and sound. In any event, we do not feel disposed to reject it, especially in view of the fact that it has so long stood as the rule in this jurisdiction, and impliedly at least has twice been approved by this court: *Honaker v. Martin*, 11 Mont. 91, 27 Pac. 397; *Hirschler v. McKendricks*, 16 Mont. 211, 40 Pac. 290.

The location of the defendant, which was not completed until September 1, 1894, did not cut off the right of plaintiff to resume work at any time prior to that date, provided his location was valid in the first instance and had not been abandoned, and provided, also, that under the rule in *Honaker v. Martin*, 11 Mont. 91, 27 Pac. 397, and *Hirschler v. McKendricks*, 16 Mont. 211, 40 Pac. 290, he diligently prosecuted the work without unreasonable interruption until the full amount was performed. Of course, if upon another trial it should appear that the plaintiff abandoned his location at any time before July, 1893, he would have no right to the ground whatever.

3. Plaintiff contends that the trial court erred in overruling his objection to the introduction in evidence of a copy of

defendant's amended notice of location. Upon the theory that the Sholes location was a valid, subsisting one at the time plaintiff entered and made his location, the latter was void ab initio ²⁶⁸ and imparted no title. In that case defendant's title would be good. His record of September 1, 1894, cured all defects in the original notice, and made the location valid except as to intervening rights.

The judgment and order are reversed, and the cause is remanded for a new trial.

ABANDONMENT AND FORFEITURE OF MINING CLAIMS.

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- a. Definition and General Principles.
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VI. Resumption of Assessment Work.

I. Abandonment.

a. Definition and General Principles.—The abandonment of a mining claim takes place only when the locator voluntarily leaves it to be appropriated by the next comer without any intention to retake or claim it again, and regardless of what may become of it

in the future. The claim then becomes a part of the public domain, subject to sale and disposition by the government, and open to location by other persons. Abandonment rests on intention as well as the acts accompanying the intention. It involves a question of fact as to both. The paramount question is the intention of the party against whom the abandonment is asserted, for there can be no strict abandonment of property without an intent to abandon: *Kinney v. Fleming* (Ariz.), 56 Pac. 723; *Richardson v. McNulty*, 24 Cal. 339; *St. John v. Kidd*, 26 Cal. 263, 271; *Niles v. Kennan*, 27 Colo. 502, 62 Pac. 360; *McKay v. McDougall*, 25 Mont. 258, ante, p. 395, 64 Pac. 669; *Mallett v. Uncle Sam etc. Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Oreamuno v. Uncle Sam etc. Min. Co.*, 1 Nev. 215; *Marshall v. Harney Peak etc. Co.*, 1 S. Dak. 350, 47 N. W. 290.

Whenever the intention and the actual surrender of a claim unite, the abandonment is complete and operates instantaneously. Lapse of time is not essential, though it may be a circumstance, with others, to prove an intent to abandon: *Davis v. Butler*, 6 Cal. 510; *Waring v. Crow*, 11 Cal. 366; *Derry v. Ross*, 5 Colo. 295; *Mallett v. Uncle Sam etc. Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484; *Harkrader v. Carroll*, 76 Fed. 474. "If the intent has been formed and once acted upon, the abandonment is as absolute 'if it exists for a minute or a second, as though it continued for years'": *Trevaskis v. Peard*, 111 Cal. 599, 605, 44 Pac. 246.

The *animus revertendi* is the simple test. The inducement that keeps alive the intent to return cannot affect the decision of the question: *Stone v. Geyser Quicksilver Min. Co.*, 52 Cal. 315. But there must be an abandonment in fact. The mere belief of the relocater or of the public is not enough: *Stone v. Geyser Quicksilver Min. Co.*, 52 Cal. 315; *Phenix etc. Min. Co. v. Lawrence*, 55 Cal. 143.

b. **What Amounts to Abandonment.**—The question of intention and of abandonment is one of fact to be determined from all the facts and circumstances of the case: *Myers v. Spooner*, 55 Cal. 257; *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31; *Weill v. Lucerne Min. Co.*, 11 Nev. 200; *Marshall v. Harney Peak etc. Mfg. Co.*, 1 S. Dak. 350, 47 N. W. 290. The following facts are sufficient to constitute an abandonment: Where the owner of a claim, which was erroneously included in a sale under a decree of court, moves his effects from the claim, and absents himself for two years, allowing the purchasers to work it without objection, although knowing that their title was invalid, and intending to claim it if their development rendered it profitable to do so: *Trevaskis v. Peard*, 111 Cal. 599, 44 Pac. 246; where the claimant removes from the claim to mine in another part of the country, where he remains two years, and declares that he has abandoned the claim and will not return to it to work: *Trevaskis v. Peard*, 111 Cal. 599, 44 Pac. 246; where the locator fails to perform the amount of work on the claim prescribed by law or local regulations: *Depuy v. Williams*, 26 Cal.

309; *Kramer v. Settle*, 1 Idaho, 485; where a locator of a claim permits an adjoining occupant to patent that part of his claim on which his discovery shaft is located the remainder reverts to the condition of public land: *Miller v. Girard*, 3 Colo. App. 278, 33 Pac. 69; citing *Gwillim v. Donnellan*, 115 U. S. 45, 5 Sup. Ct. Rep. 1110; and where one abandons his application for a patent and ceases to work, without having obtained a certificate of purchase, the claim is open to relocation: *South End Min. Co. v. Tinney*, 22 Nev. 19, 35 Pac. 89.

On the other hand the following facts do not constitute an abandonment: Where a tenant in common or a partner goes away and remains from the premises, leaving his associates in possession: *Waring v. Crow*, 11 Cal. 366; where one co-owner attempts to exclude another by a relocation: *Hulst v. Doerstler*, 11 S. Dak. 14, 75 N. W. 270; where one of two discoverers acquires the interest of the other, and then erases the name of the latter from the notice of discovery, changes the date thereof from the time of discovery to the time of acquiring the whole interest, and continues in possession, developing the claim and claiming in good faith to be the owner: *Omar v. Soper*, 11 Colo. 380, 7 Am. St. Rep. 246, 18 Pac. 443; where one is driven away from his mine by Indians, leaves his tools in an adjacent mine, and does not return before a relocation, for the reason that he supposes the Indian hostilities continue, and because of the required expenditure of money, and the belief that he has done sufficient work: *Morenhaut v. Wilson*, 52 Cal. 263; where one or more parties first locating mining ground afterward make a location on the same lode, with the names of others added to the notice, it appearing that at the time of the second location the ground was undeveloped, and that it was not known that the notices were upon the same lode, and that the second notice was posted to protect the original location: *Weill v. Lucerne Min. Co.*, 11 Nev. 200; where the notice of location, as recorded, is changed as to the course of the vein: *Gleeson v. Martin White Min. Co.*, 13 Nev. 442; where the right to the claim is continued in another by any of the modes known to the law for the transfer of property: *Richardson v. McNulty*, 24 Cal. 339, 345; and an allegation that the plaintiff's claim has been abandoned by being sold under execution is properly stricken out and the evidence thereof properly excluded, in the absence of an allegation that a sheriff's deed has been executed: *Manning v. Strehlow*, 11 Colo. 451, 18 Pac. 625.

II. Forfeiture.

a. **Definition and General Principles.**—To enable a person to maintain a right to a mining claim after it has been acquired, it is necessary that he shall continue substantially to comply, not only with the laws of Congress, but with the laws of the state and the rules established by miners in the district in which the claim is situated. A failure to comply with such laws and rules works a

forfeiture of the claim, and it becomes subject to relocation by any qualified locator: *Sisson v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829. A forfeiture involves no question of intent. It takes place by operation of law, without regard to the intention of the appropriator, whenever he neglects to comply with the conditions imposed by law. It involves only the inquiry as to whether the mining rules, regulations, and laws have been observed by the party seeking to maintain or perpetuate his claim. The inquiry is, as stated in the principal case, "Has the required expenditure been made as the law commands?": *St. John v. Kidd*, 26 Cal. 263, 271; *Bell v. Bed Rock etc. Min. Co.*, 36 Cal. 214, 218; *McKay v. McDougall*, 25 Mont. 258, ante, p. 395, 64 Pac. 669; *Mallette v. Uncle Sam etc. Min. Co.*, 1 Nev. 188, 90 Am. Dec. 484.

It is well known that courts will construe the law liberally to prevent the forfeiture of mining claims, and that they are reluctant to enforce such forfeitures, deeming them odious in law: *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036; *Mount Diablo etc. Min. Co. v. Callison*, 5 Saw. 439, Fed. Cas. No. 9886, 9 Mor. Min. Rep. 616.

b. Noncompliance with Federal Statutes.—The act of Congress (Rev. Stats., sec. 2324) provides that a failure to perform the necessary annual work will render a claim open to relocation, provided the original locators have not resumed work before relocation. Under this statute, the failure to do the annual assessment work does not, as between the locator and the government, result in a forfeiture. But the entry of a new claimant is necessary to terminate the right of the original claimant: *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; *Little Gunnell Co. v. Kimber*, Fed. Cas. 8402, 1 Mor. Min. Rep. 536; *Lakin v. Sierra Butte etc. Min. Co.*, 25 Fed. 337, 343. And, in Montana, it is only by a complete relocation after default of the first locator that a forfeiture is wrought. It is not sufficient that the relocation is initiated; it must be completed: *McKay v. McDougall*, 25 Mont. 258, ante, p. 395, 64 Pac. 669.

The failure to comply with the above statute, requiring an annual expenditure of a certain amount for labor and materials on each mining claim until the patent is issued, renders the claim subject to relocation: *Russell v. Brosseau*, 65 Cal. 605, 4 Pac. 643; *Morgan v. Tillottson*, 73 Cal. 520, 15 Pac. 88; *Johnson v. Young*, 18 Colo. 625, 34 Pac. 173; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. Rep. 301. But, generally speaking, there can be no forfeiture under this statute until the full time allowed for the doing of the annual work or the making of the annual improvements has expired: *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652; *Atkins v. Hendree*, 1 Idaho, 95; *Belk v. Meagher*, 3 Mont. 65, affirmed in 104 U. S. 279.

However, the doctrine is announced in *Sisson v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829, that the state legislature may require a reasonable additional amount of work to be done

annually, and a reasonable amount of work to complete the location, or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by Congress for the annual expenditure, as a condition to the continuance of the right acquired by location of the mine. The statute here in question required the locator to perform a certain amount of work or make certain improvements within ninety days after posting notice of location. This case was approved in *Northmore v. Simmons*, 97 Fed. 386, 389, in which case a regulation of a mining district of similar import to the Nevada statute was involved and enforced.

c. With State and Territorial Statutes.—Failure to comply with a state statute requiring the owners of mining claims to make affidavits as to the amount of work done and have them recorded, will not work a forfeiture, since the statute only prescribes a manner of proof and is not intended to prevent making proof in any other way: *Murray Hill Min. etc. Co. v. Havenor* (Utah), 66 Pac. 762; *Book v. Justice Min. Co.*, 58 Fed. 106. See, also, *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652; *Coleman v. Curtis*, 12 Mont. 301, 30 Pac. 266. Consult, also, as to the force of state statutes, the preceding paragraph. A location not perfected according to the territorial laws within the time provided becomes, as against a subsequent locator, forfeited, and the ground therein becomes open to location: *Lockhart v. Wills*, 9 N. Mex. 344, 54 Pac. 336.

d. With Local Rules and Customs.—The authorities are not harmonious as to whether the failure to comply with local rules and customs will work a forfeiture, when they do not expressly ordain a penalty for their nonobservance. According to some authorities, a failure to observe such regulations works a forfeiture whether they provide a forfeiture for noncompliance or not: *King v. Edwards*, 1 Mont. 235; *Sissons v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829. Other authorities support the proposition that such failure does not work a forfeiture unless the rule or custom itself so provides: *Rush v. French*, 1 Ariz. 99, 25 Pac. 816, 831; *McGarrity v. Byington*, 12 Cal. 426; *Bell v. Bed Rock etc. Min. Co.*, 36 Cal. 214, 219; *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036. But see *St. John v. Kidd*, 26 Cal. 271; *Depuy v. Williams*, 26 Cal. 309. Manifestly, a mining rule or custom must have little efficacy if there is no penalty for its violation. Still the doctrine announced by the Arizona and California courts may be, as they have styled it, "a safe and conservative rule of decision, tending to the permanency and security of mining titles." In *Jupiter Min. Co. v. Bodie Con. Min. Co.*, 7 Saw. 96, 11 Fed. 666, it is held that a regulation requiring locations to be recorded must, in order to work a forfeiture, provide therefor.

e. Forfeiture to Co-owner.—Section 2324 of the Revised Statutes of the United States provides that upon the failure of one owner of a mining claim to contribute his proportion to the ex-

penditures required by such statute, his co-owners who perform the labor or make the improvements may, at the end of the year, give the delinquent owner notice, and if he fails to contribute his proportion within ninety days thereafter, his interest in the claim shall become the property of his co-owners making the required expenditure. This is a statute of forfeitures and is strictly construed. That the forfeiture may be worked, the facts constituting it, or laying the foundation therefor, must exist: *Brundy v. Mayfield*, 15 Mont. 201, 206, 38 Pac. 1067. Moreover, in applying this statute the rule that cotenants stand in a relation to each other of mutual trust and confidence should not be lost sight of: *Turner v. Sawyer*, 160 U. S. 578, 14 Sup. Ct. Rep. 192. The burden of proof is upon those seeking to establish the forfeiture to show by a preponderance of evidence that the interest of a co-owner is regularly and legally devested: *Haynes v. Briscoe* (Colo.), 67 Pac. 156.

The notice calling upon co-owners in a mining claim to contribute their shares of necessary expenses may include the expenditures for several years. It is not necessary to give a separate notice for each year: *Elder v. Horseshoe Min. etc. Co.*, 9 S. Dak. 636, 62 Am. St. Rep. 895, 70 N. W. 1060. But a notice is fatally defective if it does not specify the amount of money spent upon each claim, nor the facts which might excuse expenditure upon each claim: *Haynes v. Briscoe* (Colo.), 67 Pac. 156. A notice of forfeiture directed to R. W., his heirs, administrators, and all whom it may concern, he being then deceased, and there being no administrator of his estate, is sufficient: *Elder v. Horseshoe Min. etc. Co.*, 9 S. Dak. 636, 62 Am. St. Rep. 895, 70 N. W. 1060.

The effect of a valid notice calling upon co-owners to contribute their shares of the annual expenditures required to be made upon such claim, if such contribution is not made, is to cut off the owner in default and all interests dependent upon his, whether the persons claiming are minors, heirs, or lienholders, though such persons are not expressly named in the notice: *Elder v. Horseshoe Min. etc. Co.*, 9 S. Dak. 636, 62 Am. St. Rep. 895, 70 N. W. 1060.

III. Performance of Assessment Work.

a. **Who may Perform the Work.**—The work done on a mining claim, in compliance with section 2324 of the Revised Statutes of the United States, by a mere trespasser or stranger to the title does not inure to the benefit of the locator. But if the mine is represented by an owner, and annual work is performed by or at his instance, or some one in privity with him, it is sufficient: *Nesbitt v. Delamar's etc. Min. Co.*, 24 Nev. 273, 77 Am. St. Rep. 807, 52 Pac. 609, 53 Pac. 178; *Little Gunnell Co. v. Kimber*, Fed. Cas. No. 8402, 1 Mor. Min. Rep. 536.

b. **When the Work Must be Performed.**—Under the United States statutes, there is no definite time within a year when the work on a mining claim must be done. If it is performed any time

within the year, this is enough, and there can be no forfeiture until the entire year has gone by. The person making the location has one year in which to make the representation, and after making one representation, he has the whole of the next year in which to make the next representation: *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *Atkins v. Hendree*, 1 Idaho, 95; *Belk v. Meagher*, 3 Mont. 65, affirmed in 104 U. S. 279. Nevertheless, state statutes requiring a certain amount of work to be done within ninety days after the location is made have been upheld: *Sisson v. Sommers*, 24 Nev. 379, 77 Am. St. Rep. 815, 55 Pac. 829; so have regulations of a mining district to the same effect: *Northmore v. Simmons*, 97 Fed. 386.

c. Sufficiency of the Work.

1. **In General.**—Section 2324 of the Revised Statutes prescribes that not less than one hundred dollars' worth of labor shall be performed on the claim during each year. To meet this requirement, the work must really and actually be of the value of one hundred dollars, and not merely to be counted as that amount. The doing of a certain number of days' work, which according to an arbitrary rate allowed therefor by a regulation of a local mining association would amount thereto, is insufficient if the amount of work performed is shown to have been really worth much less than one hundred dollars: *Woody v. Bernard*, 69 Ark. 579, 65 S. W. 100.

It is well settled that the annual expenditure required by the statute may be made either in labor or improvements put upon the claim itself, or upon one of a group of contiguous claims to which the particular claim belongs, or, in some instances, upon adjoining ground not included in any claim. The outlay is regarded as made upon the claim, within the meaning of the statute, whenever it is made for the development of the claim, and to facilitate the extraction of the minerals it may contain: *Power v. Sla*, 24 Mont. 243, 251, 61 Pac. 468; *Smelting Co. v. Kemp*, 104 U. S. 636, 655; *Mount Diablo etc. Min. Co. v. Callison*, 5 Saw. 439, 9 Mor. Min. Rep. 616, Fed. Cas. 9886; *Book v. Justice Min. Co.*, 58 Fed. 106. In order to comply with the law, it is not necessary that the assessment work should be done upon the surface of the claim. It may be done on the surface or beneath the surface, and this is sufficient, although it may be that the work is performed on a lode having its apex outside the surface lines: *Mount Diablo etc. Min. Co. v. Callison*, 5 Saw. 439, 9 Mor. Min. Rep. 616, Fed. Cas. No. 9886. But the statute requires, as to the nature of the labor or improvements, that they should be for the development of the claim—that is, to facilitate the extraction of the metals it may contain: *Bishop v. Baisley*, 28 Or. 119, 135, 41 Pac. 933; *Remington v. Baudit*, 6 Mont. 138, 9 Pac. 819. It is immaterial whether the improvement is upon patented or unpatented property, except as this may throw light upon the intention of the parties doing the work: *Hall v. Kearney*, 18 Colo. 505, 509; *Sherlock v. Leighton (Wyo.)*, 63 Pac. 580, 33 Pac.

373; and a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine, in place of that of the owner: *Mann v. Budlong*, 129 Cal. 577, 62 Pac. 120.

2. Work Outside the Claim.—Work done for the development of a mine is deemed to have been done on the mine, although actually done at a distance therefrom: *Richards v. Wolding*, 98 Cal. 195, 32 Pac. 971; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362; constructing a ditch on adjoining land to enable the owners of a claim to work it is work on the claim within the meaning of the rules of a mining locality, requiring claims to be worked two days in every ten: *Packer v. Heaton*, 9 Cal. 568. In *Doherty v. Morris*, 17 Colo. 105, 28 Pac. 85, an expenditure incurred in constructing a wagon road across the adjacent country to a mining claim, for the purpose of facilitating the development and operation of the claim, was considered a compliance with the statutory requirement as to annual assessment work. And in *Smelting Co. v. Kemp*, 104 U. S. 636, it is said, in respect to a placer claim, that where labor is performed for the turning of a stream or the introduction of water to the claim, or where the improvement consists in constructing a flume to carry off the debris or waste material, it may be considered assessment work. Personal expenses incurred, and the value of the locator's time in endeavoring to procure water to operate a mill to crush ore from a mine, cannot be considered as labor done on the mine: *Du Pratt v. James*, 65 Cal. 555, 4 Pac. 562.

There is no presumption that work done outside the surface boundaries of a location was for the development of the claim. On the contrary, after proof that the annual assessment has not been done within the boundaries, it is incumbent on the party so contending to show that such work as has been done elsewhere was, in fact, intended as the annual assessment upon the claim and was of such a character as would inure to the benefit thereof: *Hall v. Kearny*, 18 Colo. 505, 33 Pac. 373; *Sherlock v. Leighton* (Wyo.), 63 Pac. 580.

3. Construction of Buildings.—To make a building erected on a mining claim an improvement, within the law requiring annual labor, it must have been placed there for the purpose of benefiting the claim, and for its development: *Bryan v. McCaig*, 10 Colo. 309, 15 Pac. 413. The erection of a dwelling-house without the boundaries of the claim, for the shelter and convenience of the miners, cannot be considered as a part of the annual work: *Remington v. Baudit*, 6 Mont. 138, 9 Pac. 819.

4. Prospecting and Discovery.—Expressions occur in a few of the decided cases to the effect that work done for the purpose of discovering mineral or for the purpose of prospecting or developing the ground or claim, may be considered as assessment work: See *Mount Diablo etc. Min. Co. v. Callison*, 5 Saw. 439, 9

Mor. Min. Rep. 616, Fed. Cas. No. 9886; *United States v. Iron Silver Min. Co.*, 24 Fed. 568; *Book v. Justice Min. Co.*, 58 Fed. 106. It is improbable, however, that prospecting as thus used is considered in the sense of exploration and discovery which is necessary before location, but rather in the sense of development and demonstration that the value of the ledge may be determined, as distinguished from the ascertainment of its existence: *Bishop v. Baisley*, 28 Or. 119, 136, 41 Pac. 936. Picking rock from the walls of a shaft or from the sides or outcroppings of a ledge, in small quantities and from day to day, and testing them in order to find a paying vein, cannot be credited as a part of the annual work and improvement required by law: *Bishop v. Baisley*, 28 Or. 119, 136, 41 Pac. 936.

5. **Services of Watchman.**—If a mine is idle, the services of a watchman in looking after the property and taking care of it may constitute work upon the claim sufficient to hold it, if such care is necessary to preserve tunnels, buildings, or other structures erected to work the mine. But if there is only the naked claim to be looked after, and a watchman is placed there merely to warn prospectors and thus prevent a relocation, this is not labor within the meaning of the law: *Altoona Quicksilver Min. Co. v. Integral etc. Min. Co.*, 114 Cal. 100, 45 Pac. 1047; *Lockhart v. Rollins*, 2 Idaho, 503, 21 Pac. 413.

6. **Work on One Claim for Benefit of All.**—"It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of the different locations to combine and work them as one general claim; and expenditures which may be necessary for the development of all the claims may be made upon one of them. . . . In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made or the labor be performed upon any one of them": *Jackson v. Roby*, 109 U. S. 440, 445, 3 Sup. Ct. Rep. 301.

It is now well settled that when several adjoining claims are held in common, work for the benefit of all, done upon any one of them, in a given year, to an amount equal to that required to be done on all and of a character calculated to inure to their benefit, meets the requirements of the United States mining laws: *Eberle v. Carmichael*, 8 N. Mex. 169, 42 Pac. 95; *Axiom Min. Co. v. White*, 10 S. Dak. 198, 72 N. W. 462; *Wilson v. Triumph etc. Min. Co.*, 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300; *Kloppenstine v. Hays*, 20 Utah, 45, 54, 57 Pac. 712; *Fissure Min. Co. v. Old Susan Min. Co.*, 22 Utah, 438, 63 Pac. 587; *Book v. Justice Min. Co.*, 58 Fed. 106, 117; *Justice Min. Co. v. Barclay*, 82 Fed. 554, 560. The question of whether work done on one claim is for the benefit of con-

tiguous claims is of fact for the jury: *Yreka Min. Co. v. Knight*, 133 Cal. 544, 65 Pac. 1091.

The claims must, in such cases, be contiguous, so that each claim may in some way be benefited by the work done on one of them: *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. Rep. 428; *Royston v. Miller*, 76 Fed. 50. Work performed and expenses incurred in the general development of an oil-bearing district comprehending many separate claims held by the same owners, whatever the amount thereof, can inure to the benefit of only the claims contiguous to these operations, notwithstanding that it constitutes the most economical and feasible method of working the oil, and eventually may result in extracting the oil from all the other claims: *Gird v. California Oil Co.*, 60 Fed. 531.

7. Excuse for Nonperformance.

A. Ouster and Adverse Possession.—If adverse possession of a mining claim is taken and held wrongfully, the rightful owner or locator is excused from doing the assessment work or performing other requirements to perfect his claim during the time of such holding: *Mills v. Fletcher*, 100 Cal. 142, 34 Pac. 637; *Utah Min. etc. Co. v. Dickert etc. Sulphur Co.*, 6 Utah, 183, 207, 21 Pac. 1002; *Erhardt v. Boaro*, 8 Fed. 692. If he is prevented from perfecting his claim by a wrongful intrusion, and by threats of violence if he attempts to resume possession, this furnishes him an excuse: *Miller v. Taylor*, 6 Colo. 41; *Erhardt v. Boaro*, 113 U. S. 527, 534, 5 Sup. Ct. Rep. 560. But acts of such nature must in some way have prevented him from completing his location. He cannot wait until his location is forfeited, and then offer the excuse that he afterward learns that during the time he might have perfected his claim others were holding adversely to him: *Lockhart v. Wills*, 9 N. Mex. 344, 54 Pac. 336.

B. Fraud and Conspiracy.—It is immaterial to show that the failure to perform assessment work was due to a conspiracy to defraud the party on the part of his colocator with other persons who locate the ground after forfeiture: *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911; *Lockhart v. Wills*, 9 N. Mex. 344, 54 Pac. 336. A neglect to do the assessment work is not excused by the neglect of one owner to do the work as he has promised under an agreement with his co-owner. And a stranger may make a valid relocation: *Doherty v. Morris*, 11 Colo. 12, 16 Pac. 911. So may the co-owner in default: *Saunders v. Mackey*, 5 Mont. 523, 6 Pac. 361. Compare *Royston v. Miller*, 76 Fed. 50.

C. An Applicant for a Patent to a mining claim who has made a final entry, paid the purchase price, and obtained a certificate of purchase, is not obliged to continue the annual expenditure upon the claim, pending the final decision upon his application, and the issuance of the patent. His equitable rights are then complete: *Alta Min. etc. Co. v. Benson Min. etc. Co. (Ariz.)*, 16 Pac. 565; *Au-*

roza Hill etc. Min. Co. v. '85 Min. Co., 34 Fed. 515; Benson etc. Min. Co. v. Alta Min. etc. Co., 145 U. S. 428, 12 Sup. Ct. Rep. 877.

IV. Pleading.

Abandonment of a mining claim need not be specially pleaded, but may be given in evidence under a denial of title: *Trevaskis v. Peard*, 111 Cal. 599, 603, 44 Pac. 246. A forfeiture, however, must be specially pleaded, and cannot be shown under the general issue: *Morenhaut v. Wilson*, 52 Cal. 263; *Renshaw v. Switzer*, 6 Mont. 464, 13 Pac. 127; *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936. "The plea of forfeiture is in the nature of a confession and avoidance. It admits a prior right in the plaintiff, which would have continued but for the entry and location by the defendant, which, under the mining law, had terminated it. One who relies upon such a plea must set forth the facts upon which he relies to overturn the prior right of his adversary": *Power v. Sla*, 24 Mont. 243, 61 Pac. 468. It is not sufficient for defendants, claiming under a relocation after an alleged forfeiture of the plaintiff, to allege that the plaintiff failed during certain years to perform one hundred dollars' worth of work and labor on the claim. They must also negative the expenditure of that amount in improvements: *Power v. Sla*, 24 Mont. 243, 61 Pac. 468.

V. Evidence.

a. *Of Abandonment in General.*—Upon the question of abandonment of a mining claim, as upon the question of fraud, a wide range of proof is allowed, since it is ordinarily only from facts and circumstances that the truth can be discovered. "Both parties should be allowed to prove any fact or circumstance from which any aid for the solution of the question can be derived": *Bell v. Bed Rock etc. Min. Co.*, 36 Cal. 214, 218. The direct testimony of claimants as to their abandonment, or their intention to abandon, is not conclusive: *Myers v. Spooner*, 55 Cal. 257; *McCann v. McMillan*, 129 Cal. 350, 62 Pac. 31. It may be proved by their acts and conduct, even against their express declarations to the contrary: *Trevaskis v. Peard*, 111 Cal. 599, 44 Pac. 246.

b. *Of Forfeiture in General.*—All the authorities agree that a forfeiture of a mining claim cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law: *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036; *Power v. Sla*, 24 Mont. 243, 61 Pac. 468; *Crown Point Gold Min. Co. v. Crismon*, 39 Or. 364, 65 Pac. 87; *Axiom Min. Co. v. White*, 10 S. Dak. 198, 72 N. W. 462; *Hammer v. Garfield etc. Min. Co.*, 130 U. S. 291, 9 Sup. Ct. Rep. 548; *Book v. Justice Min. Co.*, 58 Fed. 106, 118. If the finding of a forfeiture is not supported by clear and convincing proof, it will not be sustained on appeal: *Strasburger v. Beecher*, 20 Mont. 143, 49 Pac. 740. In *Wright v. Killian*, 132 Cal. 56, 64

Pac. 98, the evidence is held sufficient to support a finding that the required annual labor on a claim had been done. The conduct and interest of defendants claiming the advantage of a relocation through a forfeiture may be considered in weighing their testimony concerning the forfeiture: *Doherty v. Morris*, 17 Colo. 105, 28 Pac. 85.

c. **Burden of Proof.**—After a valid mining location has been made, the title thus acquired remains so until forfeited or abandoned, whether the annual assessment work has been performed or not. And a party seeking to initiate a claim to mining premises already legally located has the burden of proving by clear and convincing evidence that the annual labor thereon has not been performed, in order to establish that the ground so located is subject to location: *Providence Gold Min. Co. v. Burke* (Ariz.), 57 Pac. 641; *Quigley v. Gillett*, 101 Cal. 462, 35 Pac. 1040; *Beals v. Cone*, 27 Colo. 473, 83 Am. St. Rep. 92, 62 Pac. 948; *Axiom Min. Co. v. White*, 10 S. Dak. 198, 72 N. W. 462; *Hamner v. Garfield Min. Co.*, 130 U. S. 291, 301, 9 Sup. Ct. Rep. 548.

When, however, he shows that the required work has not been done within the boundaries of the claim, he makes out a prima facie case. Then, if his adversary relies on labor done outside the claim, the burden is cast upon him to prove the performance of such labor, and that its reasonable tendency is to the benefit of the claim: *Hall v. Kearny*, 18 Colo. 505, 33 Pac. 373; *Sherlock v. Leighton* (Wyo.), 63 Pac. 580; *Justice Min. Co. v. Barclay*, 82 Fed. 554.

VI. Resumption of Assessment Work.

A failure to do the requisite amount of annual development work under section 2324 of the Revised Statutes of the United States simply renders the claim subject to relocation by third persons after the lapse of a year, and not before. Such right of relocation is itself lost, and the original locator is restored to his full rights, if he enters without force, and resumes work, before a relocation is made by any third party: *Emerson v. McWhirter*, 133 Cal. 510, 65 Pac. 1036; *Gonn v. Russell*, 3 Mont. 358; *Lacey v. Woodward*, 5 N. Mex. 583, 25 Pac. 785; *Belk v. Meagher*, 104 U. S. 279, 283; *Preston v. Hunter*, 67 Fed. 996, 1000. The failure of the owner to occupy or work his claim during a given year will not divest him of his title and confer it upon another. A failure to work the claim to the amount required by statute merely entitles other persons to relocate it: *Oscamp v. Crystal River Min. Co.*, 58 Fed. 293, 296.

And if relocations have been made after the original owner has failed to do the annual assessment work, but such relocations are subsequently abandoned, and thereafter the original locator performs assessment work reviving his rights, the fact of the intermediate relocations cannot aid one who afterward attempts to re-

locate the same ground: *Klopenstine v. Hays*, 20 Utah, 45, 57 Pac. 712; *Justice Min. Co. v. Barclay*, 82 Fed. 554.

The law in this connection is well stated in *Jordan v. Duke* (Ariz.), 53 Pac. 197, 201, in this language: "Since the case of *Belk v. Meagher*, 104 U. S. 279, and the multitude of cases following it, it has become a settled law that, if the work be not completed on a mining claim in any part of the year in which the statute requires it to be done, but the owners thereof are upon the ground for the purpose of doing the work before the year expires, and then prosecute the work to completion, the work so prosecuted will have relation to the year in which it should have been done, and that such resumption will prevent the claim from being forfeited. Such resumption effectually prevents it from becoming forfeited, and no forfeiture can take place until after there has been a failure to prosecute the work, after the same has been resumed. It is also well settled that, until a claim has been abandoned, or has been forfeited, no other location can be made of the ground. The decisions go so far as to make it a settled law that, if the first locator resumes work at any time, even after the expiration of the year, but before other rights attach in favor of relocators, he preserves his claim."

When, however, one avails himself of the privilege of resuming work to preserve his claim from forfeiture, he must be in good faith and prosecute the work with reasonable diligence until the requirement for annual labor and improvements is obeyed: *Honaker v. Martin*, 11 Mont. 91, 27 Pac. 397 (repudiating *Belcher etc. Min. Co. v. Deferrari*, 62 Cal. 160); *Hirshler v. McKendricks*, 16 Mont. 211, 40 Pac. 290. To resume work, within the meaning of the statute, is actually to begin work anew with a bona fide intention of prosecuting it as required by the statute: *McCormick v. Baldwin*, 104 Cal. 227, 37 Pac. 903. Going on a claim with tools and securing samples of ore is not a valid resumption: *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936. When an owner resumes work, he must perform all that would have been necessary for him to perform the previous year: *Jordan v. Duke* (Ariz.), 53 Pac. 197.

The right of the original owner to perform labor on a claim after his failure to perform the requisite amount, and have the benefit of his location, is dependent upon his having performed the labor before relocation: *Du Prat v. James*, 65 Cal. 555, 4 Pac. 562. The difficulty is to determine when the relocation has been made, so as to cut off this right. In *Pharis v. Muldoon*, 75 Cal. 284, 17 Pac. 70, it is decided that the resumption of work after a notice of relocation has been posted, but before the boundaries of the relocation are marked, is sufficient to save the estate of the original locator. The supreme court of Montana has gone the length to require that the relocation must not only be initiated, but must be perfected, in order to bar the original locator of his right of resumption. Under this rule, he may resume work at any time prior

to the performance of all the acts on the part of the relocater necessary to constitute a complete location, the latter not being protected by merely initiating his location: *Gonn v. Russell*, 3 Mont. 358; *McKay v. McDougall*, 25 Mont. 258, ante, p. 395, 64 Pac. 669. While this doctrine seems logical, and is directly opposed to no case that has come under our observation, it must be confessed that it affords small encouragement and protection to relocators. In *Lindley on Mines*, sections 408, 654, a conclusion contrary to that of the Montana court is reached, mainly in reliance, apparently, on *Little Gunnel Min. Co. v. Kimber*, Fed. Cas. No. 8402, 1 Mor. Min. Rep. 536.

BURKE v. INTERSTATE SAVINGS AND LOAN ASSN.

[25 Mont. 315, 64 Pac. 879.]

PLEADING.—A REPLY DENYING "EACH AND EVERY MATERIAL ALLEGATION" of the answer is bad. But objection thereto, if not taken in the court below, is waived on appeal. (p. 418.)

PLEADING.—IF THE COMPLAINT IN AN ACTION ON A NOTE averred that the note was past due and unpaid, that payment had been demanded, and that the plaintiff was the holder thereof, a judgment thereon is admissible in a collateral action, conceding that nonpayment of the note was defectively alleged. (p. 419.)

JUDGMENT—COLLATERAL ATTACK.—UNLESS VOID on its face, or upon the inspection of the judgment-roll, a judgment cannot be successfully attacked collaterally. A voidable judgment is not open to such attack. (p. 420.)

JUDGMENT—PRESUMPTION OF JURISDICTION.—UPON DIRECT ATTACK by appeal, the presumption that a court rendering a judgment by default had jurisdiction of the person of the defendant does not obtain. (p. 420.)

JUDGMENT—PRESUMPTION OF JURISDICTION.—WHEN AN ATTACK, other than by appeal, is made on the judgment of a court of general jurisdiction, the presumption is that jurisdiction was obtained of the person of the defendant provided it does not appear from the judgment-roll that he was without the jurisdiction of the court. (p. 420.)

JUDGMENT.—THE AFFIDAVIT OF SERVICE OF SUMMONS, made by a private person, may, upon a direct attack on a judgment other than by appeal, be falsified by evidence aliunde the record. (p. 421.)

JUDGMENT—COLLATERAL ATTACK.—THE PRESUMPTION OF JURISDICTION over the person of the defendant is conclusive, when a judgment is assailed collaterally, unless a lack thereof appears on the face of the judgment-roll. (p. 421.)

A JUDGMENT, WHEN COLLATERALLY ATTACKED, MUST BE TRIED by inspection of the judgment-roll, and by that alone. (p. 421.)

JURISDICTION IS ACQUIRED BY THE FACT OF SERVICE, and not by proof thereof. (p. 423.)

JUDGMENT—COLLATERAL ATTACK.—AN IRREGULARITY IN THE SERVICE of process on the defendant does not render the judgment vulnerable to a collateral attack. (pp. 423, 424.)

JUDGMENT—COLLATERAL ATTACK.—THE FACT THAT THE AFFIDAVIT OF SERVICE of summons does not state that the affiant was of the age required by statute does not render the judgment subject to collateral attack. (pp. 421, 424.)

JUDGMENT.—IF SERVICE OF SUMMONS IS MADE BY ONE NOT OF THE AGE required by statute, the judgment is not, for that reason, either void or subject to any attack, save by appeal. (p. 425.)

A JUDGMENT BY A COURT HAVING JURISDICTION of the subject matter and of the parties, and keeping within the limits of its power, though it may be voidable, is never void. (p. 425.)

SERVICE OF SUMMONS ON SUNDAY IS NOT A NULLITY, but a mere irregularity, and a judgment based upon it is not void. (p. 427.)

SERVICE OF SUMMONS ON SUNDAY IS VOIDABLE. It may be quashed or set aside on motion, but, like any other irregularity, may be waived. (p. 427.)

Stanton & Stanton, for the appellant.

James W. Freeman and Sol. Hepner, for the respondent.

316 PIGOTT, J. On July 15, 1892, the plaintiff delivered to the defendant his promissory note of that day, and, to secure its payment, executed a mortgage on a lot in Great Falls, Montana. In his complaint he states, in substance, that the note and mortgage have been fully paid and satisfied by him, but that the defendant refuses to surrender the note or satisfy the mortgage, and retains them; that the defendant refuses to account to the plaintiff, or to pay over to him an amount which the plaintiff alleges he has paid to the defendant in excess of the debt; and that the defendant claims an interest in the property mortgaged adverse to the plaintiff, but that such interest, if any there be, is subject to the right and title of the plaintiff. Judgment is prayed for an accounting, and that the defendant be required to satisfy and discharge the mortgage and deliver to the plaintiff the note, to quiet the title of plaintiff as against the defendant, and for judgment in his favor for such sum as may be ascertained to be due. The defendant, by answer, denies that the note and mortgage, or either, have or has been paid or satisfied; and pleads that the defendant has been the owner and in possession of the property so mortgaged since the fourteenth day of September, 1894. The defendant demands judgment that the com-

plaint be dismissed, and the defendant be decreed to be the ³¹⁷ owner and entitled to the possession of the property as against the plaintiff and those claiming through or under him. The plaintiff, by reply, denies "each and every material allegation in said amended answer contained." There was a trial by jury, whose findings were set aside by the court. Findings were then made by the court, judgment was rendered releasing and discharging the plaintiff from further liability on account of the note and mortgage, and declaring that the defendant has a good and sufficient title to the property, and quieting it in the defendant as against the plaintiff and those asserting any interest acquired by or through him. From the judgment the plaintiff has appealed. Many errors are specified. Some of them are not considered of sufficient importance to require special notice.

1. The defendant suggests that the judgment should be affirmed because the reply is insufficient to raise an issue upon any of the allegations of new matter in the answer. This suggestion is based upon the ground that the plaintiff in his reply denies the "material" allegations of the answer. Such form of attempted denial is bad, for the reason that it is equivalent to saying that the truth of such allegations as the court may decide to be material is controverted, thus rendering it impossible to determine from the reply what is intended to be traversed. Such a denial is at least uncertain. But there was no objection in the court below to the form of the denial, and the cause was tried upon the assumption that the denial was sufficient. Conceding that a reply was necessary to frame an issue upon the new matter in the answer, the objection that might have been interposed to the denial therein contained was waived: *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 75, 60 Pac. 991. To hold that the plaintiff, under these circumstances, must be deemed to have admitted the truth of the averments in the answer, would be palpably unjust.

2. To establish its title to the land, the defendant introduced in evidence the judgment-roll in a cause entitled "*Moritz Conhaim v. John Burke*." The roll disclosed that on October ³¹⁸ 16, 1893, Conhaim caused to be filed in the district court of Cascade county, Montana, his complaint in an action upon a promissory note alleged to have been made by Burke to him, and that on the same day a summons in proper form was issued; that, thereafter the summons was returned and filed, together with the proof of service indorsed thereon as follows:

"State of Montana, }
County of Cascade. }

"J. M. Burlingame, Jr., being duly sworn, says that I received the within summons on the sixteenth day of October, A. D. 1893, and personally served the same on the thirteenth day of November, A. D. 1893, upon John Burke, being the defendant named in said summons, by delivering to said defendant, personally, in the said county of Cascade, a copy of said summons.

"JAMES M. BURLINGAME, JR.

"Service, \$1.50.

"Subscribed and sworn to before me at Great Falls, Montana, this thirteenth day of November, 1893.

"F. B. WILCOX,
"Notary Public."

The judgment-roll further disclosed that the default of Burke was duly entered, and that on November 24, 1893, judgment by default was rendered and entered for the amount of money stated in the complaint and summons; the judgment reciting, among other things, the following: "In this action the defendant, John Burke, having been regularly served with process, and having failed to appear and answer the plaintiff's complaint filed herein, the legal time for answering having expired, and no answer or demurrer having been filed, the default of the said defendant, John Burke, in the premises having been duly entered according to law, upon application of said plaintiff to the court judgment is hereby entered against said defendant in pursuance of the prayer of said complaint." The defendant proved that the property mortgaged was sold under an execution issued on the judgment, and that on the twenty-eighth day of June, 1894, the sheriff executed his deed conveying the property to one Burlingame, and that Burlingame on September ³¹⁹ 14th of the same year conveyed the property to the defendant in the present cause. To the introduction of the judgment-roll the plaintiff objected upon two grounds: 1. Because the court which rendered the judgment had no jurisdiction over the subject matter of the action, for the reason that the complaint did not state facts sufficient to constitute a cause of action, in that it did not allege nonpayment of the promissory note; and 2. Because the court had no jurisdiction over the defendant in that action, for the reason that he never appeared, "and the summons therein was not

served by an officer or a person over the age of eighteen not a party to the action, and for the further reason that the affidavit constituting the proof of attempted service of summons does not state that the affiant was of the age of eighteen, or any other age, at the time of such attempted service." Plaintiff excepted to the overruling of the objections, and specifies the action of the court in that regard as error.

(a) Disposition is readily made of the objection that the judgment is void because the complaint is insufficient in substance. The action was upon a promissory note made by Burke to Conhaim. After pleading execution of the note, the complaint proceeds: "That the said note is now long past due and unpaid; that payment of the same has been frequently demanded; that plaintiff is now the owner and holder thereof." Conceding that the plaintiff was under the necessity of pleading nonpayment of the note, and assuming that the complaint in that regard was defective, nevertheless there was not a total omission of the material averment, but a mere imperfection of statement, which could have been reached only by special demurrer. This is a sufficient answer to the first objection. We prefer, however, to place our decision upon a broader ground, and, in order to do so, we shall assume that the complaint was lacking in the matter necessary to constitute the statement of any cause of action. The district court of Cascade county, which rendered the judgment in Conhaim against Burke, is a court of record, and of general jurisdiction, both legal and ³²⁰ equitable. It has jurisdiction of the class of cases to which Conhaim against Burke belongs. It had jurisdiction, therefore, over the subject matter of that action; it had authority—that is, power to grant the relief which it did grant by the judgment, and hence there was no excess of jurisdiction. A judgment which is merely voidable is not open to collateral attack. A void judgment is that which is a judgment in name or form only. Unless void on its face, or upon the inspection of the judgment-roll, a judgment cannot be successfully attacked collaterally. Upon collateral attack it matters not that such a court erred in determining any question of law or fact; the judgment is not thereby made void. The irregularity or error may be corrected, or the judgment avoided, on appeal, or on a proper and seasonable application to the court in which the action is pending; but it cannot be set aside or purged of error by any other mode. These principles seem to be self-evident, and the authority of adjudged cases supports

them: *Altman v. School Dist.*, 35 Or. 85, 76 Am. St. Rep. 468, 56 Pac. 291; *In re James' Estate*, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; 1 *Freeman on Judgments*, sec. 118; 17 Am. & Eng. Ency. of Law, 2d ed., 1069-1072, and cases there cited.

(b) Upon direct attack by appeal, the presumption that the court rendering a judgment by default had jurisdiction of the person of the defendant does not obtain. Unless the record in some way discloses the acquisition of jurisdiction over the defendant, the judgment will be reversed by the appellate court: *Schloss v. White*, 16 Cal. 65; *Connolly v. Alabama etc. R. R. Co.*, 29 Ala. 373; 1 *Black on Judgments*, sec. 93; 2 *Freeman on Judgments*, sec. 536. Where a direct attack, other than by appeal, is made upon the judgment of a domestic court of general jurisdiction, the prima facie presumption must be indulged that jurisdiction was obtained of the person of the defendant, unless the record affirmatively shows the contrary; provided it does not appear from the judgment-roll that the defendant was at the time of service without the territorial limits of the court's jurisdiction. Upon such direct attack, the prima facie presumption of jurisdiction ³²¹ may be rebutted by competent evidence establishing the lack of jurisdiction over the defendant—some courts rejecting evidence tending to controvert the officer's return of service, and others admitting it (as is the rule in Montana) for that purpose, but all agreeing that the affidavit of service of summons made by a private person may upon direct attack, other than appeal, be falsified by evidence aliunde the record. When, however, the judgment of a court of general jurisdiction, acting within the ordinary scope of that jurisdiction, is assailed collaterally, the presumption of jurisdiction over the person of the defendant is conclusive, unless upon the face of the judgment-roll a lack of jurisdiction affirmatively appears. A judgment, when collaterally attacked, must be tried by inspection of the judgment-roll, and by that alone. These rules rest upon well-established principles.

By "collateral attack," as the expression is used in this opinion, is meant every proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered or by appeal, and except suits brought to obtain decrees declaring judgments to be void *ab initio*. In the case at bar a judgment rendered by a court of record of general jurisdiction, which jurisdiction was exercised according to the course of the common law, is attacked col-

laterally. The judgment so rendered is asserted to be void upon the ground that the affidavit constituting the proof of the attempted service of summons does not state that the affiant was over the age of eighteen years at the time of the service, and upon the ground that the defendant never appeared, and the summons was not served by a person over the age of eighteen years, nor by an officer.

It may be that the recital in the judgment to the effect that the defendant in the action of Conhaim against Burke had been regularly served with process is not in conflict with, but, upon collateral attack, must be deemed to supplement, the statements contained in the affidavit of service made by Burlingame (*Peck v. Strauss*, 33 Cal. 678; *Passault v. Austin*, 36 Cal. 691; *Alderson v. Bell*, 9 Cal. 315); we are inclined to think ³²² that such should be declared to be the effect of the recital when the judgment is collaterally, or otherwise than in the action or on appeal, attacked, but we reserve a decision of this question, and shall, for the present at least, consider the affidavit of service as being the only proof in the record showing, or tending to show, jurisdiction of the person of Burke. The sole inquiry under the doctrines which we have announced is: Does the judgment-roll in Conhaim against Burke affirmatively disclose that the court was without jurisdiction of the defendant therein? There is no controversy in respect of the validity of the summons. No question arises as to the process itself—it was in all respects conformable to law. The judgment-roll in Conhaim against Burke is not silent touching the jurisdictional facts, and for the purpose of this appeal we assume, for the time being, that the presumptions which the law raises in support of judgments of courts of general jurisdiction are not indulged when the judgment-rolls contain evidence with reference to the jurisdictional facts, but that the evidence alone, unaided by presumptions, is to be considered in determining whether jurisdiction existed, although we think that the rule may, perhaps, be too broadly stated in *Galpin v. Page*, 18 Wall. 350, for it does not seem unreasonable to us that, on attack other than by appeal, the presumption of jurisdiction over the person of the defendant ought to be indulged in favor of the judgments of such courts, except in those instances where the record, as a whole, affirmatively discloses want of jurisdiction, as was the case in *Dietrich v. Martin*, 24 Mont. 145, 81 Am. St. Rep. 419, 60 Pac. 1087, or that the court was not proceeding within the ordinary scope

of its power exercised according to the general course of the common law; an example of the latter exception is a case in which the judgment-roll shows that at the time of the service or attempted service of summons the defendant was beyond the territorial limits of the court's authority, and does not contain evidence either of service upon him within those limits, or of his appearance. *Dietrich v. Martin*, 24 Mont. 145, 81 Am. St. Rep. 419, 60 Pac. 1087, seems to be an example of the second exception, as well as of the first.

³²³ From the time the summons is served the court is deemed to have jurisdiction of the defendant, and hence jurisdiction of the defendant in *Conhaim* against *Burke* was acquired, if acquired at all, by the fact that service was made upon him, not by proof of such fact. If he was personally served with summons within the state of Montana, jurisdiction was acquired. Sections 71, 78, 79, and 80 of the first division of the Code of Civil Procedure of the Compiled Statutes of 1887 provide that the summons may be served by the sheriff, or by any other person over the age of eighteen years, not a party to the action; that summons must be served by delivering a copy thereof to the defendant personally; and that proof of the service, when made by any person other than the sheriff, must be by his affidavit showing the time and place of service; and from the time of service of summons the court is deemed to have acquired jurisdiction of the parties or property, as the case may be, and to have control of all subsequent proceedings. The omission from the affidavit of *Burlingame* of the statement that, at the time he served the summons upon the defendant, he (*Burlingame*) was over the age of eighteen years, is the defect which the plaintiff in the case at bar urges as fatal; he contends that thereby the judgment-roll shows that the summons was not served by a competent person, and that therefore the judgment is void upon its face. The plaintiff fails to distinguish between a want of jurisdiction and an irregularity in obtaining it. Says Mr. Freeman in his work on Judgments: "There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. . . . The fact that defendant is not given all the time allowed him by law to plead, or that he was served by some person incompetent to make a valid service, or any other fact connected with the service of process, on account of which a judgment by default would be reversed upon appeal, will not ordinarily make the judgment vulnerable to a collateral at-

ack": Freeman on Judgments, sec. 126. Upon this subject, Mr. Black, in section 224 of his treatise on the Law of Judgments, says: "Although the service of process in an ³²⁴ action may have been characterized by some defect or irregularity, it does not necessarily follow that the ensuing judgment will be void. For, if the party would take advantage of such a matter, he must do so in the action itself, by some proper motion or proceeding. It is only when the attempted service is so irregular as to amount to no service at all that there can be said to be a want of jurisdiction. In any other case there may be error in the subsequent proceedings, but they will be sustained against a collateral attack"; and in section 263 he remarks: "We have already seen that defects or irregularities in the process, or in the manner of its service, are not sufficient to render the judgment void, unless the flaw or omission is so serious as to make the process equivalent to no process at all, or the service entirely nugatory, in which case the judgment fails for want of jurisdiction. It follows that the judgment of a court of general jurisdiction cannot be attacked collaterally when there has been some service of notice, although such service of notice may be materially defective." In *Dorente v. Sullivan*, 7 Cal. 279, a case substantially identical with the one now under consideration was presented, and the court said: "It is contended that where service is made by anyone other than an officer or his deputy, or a person appointed by the judge, the affidavit should show that the person serving the writ possesses the legal qualifications enumerated in the section; otherwise, any incompetent person might make the service. Granting this proposition, the objection only goes to the formality of the return, which might be amended by the officer. If the return is defective, the defendant must appeal from the judgment; a mere irregularity of service is not sufficient to enable him to attack the judgment collaterally." In *Peck v. Strauss*, 33 Cal. 678, the question was again presented, and the court adhered to the rule announced in *Dorente v. Sullivan*, 7 Cal. 279, and held, in addition, that the omission from the affidavit of service of a statement that the person serving the same was over the age of twenty-one was more than compensated by the recital in the judgment that the default of the defendant was duly ³²⁵ entered. The like doctrine was announced in *Drake v. Duvenick*, 45 Cal. 455, and followed in *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838. The same rule was declared in *Herman v. Santee*, 103 Cal.

519, 42 Am. St. Rep. 145, 37 Pac. 509. The supreme court of Mississippi, in *Harrington v. Wofford*, 46 Miss. 31, said: "There is a very clear and obvious distinction between a total want of service of process and a defective service of process, as to their effect in judicial proceedings. In the one case, the defendant has no notice at all of the suit or proceeding against him. The judgment or decree in such case, it is conceded, is *coram non judice* and void, upon the principles of law and justice. In the other case, the defective service of process gives the defendant actual notice of the suit or proceeding against him, and the judgment or decree in such case, although erroneous, would be valid until reversed by a direct proceeding in an appellate jurisdiction, and its validity cannot be collaterally called in question. And this view of the law is believed to be sustained by reason, principle and authority." In *Isaacs v. Price*, 2 Dill. 351, Fed. Cas. No. 7097, Judge Dillon said: "A distinction is to be made between a case where there is no service whatever, and one which is simply defective or irregular. In the first case, the court acquires no jurisdiction, and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment therein, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal. The error in the argument of the defendant is that it proceeds upon the ground that the judgment rendered upon the service made upon him was wholly void." Many other cases to the same effect might be cited.

Inspection of the judgment-roll in *Conhaim* against *Burke* does not disclose a want of jurisdiction of the defendant in that action, and therefore the judgment may not be declared void on collateral attack. Assuming the *Burlingame* affidavit to ³²⁶ have been the only proof of service, the court merely erred in adjudging the service regular.

3. From what has thus far been said it is not to be inferred that we tacitly assume the judgment would be void if the roll affirmatively disclosed that *Burlingame* was less than eighteen years of age when he served the summons, or if upon direct attack by suit in equity that fact were established by proof, nor can such an inference reasonably be deduced. When *Burlingame*, who was not a party to the action, delivered to *Burke* personally a copy of the summons, the latter was thereby notified of the pendency of the action, and of the fact that, unless

he appeared, judgment would go against him; he was put upon inquiry, and such delivery was sufficient to subject Burke to the jurisdiction of the court, despite the fact that Burlingame was not of the age prescribed. The service, though irregular or defective, sufficed to accomplish the substantial purpose and object which the law designs the summons to perform. We are of the opinion that even if the judgment-roll should exhibit the incompetency of Burlingame in the respect mentioned, or such incompetency were otherwise shown, the judgment for that reason would not be either void or subject to any attack save that by appeal. A judgment rendered by a court having jurisdiction of the subject matter and of the parties, and keeping within the limits of its power, though it may be voidable, is never void. Jurisdiction of a defendant, when irregularly acquired, may be renounced as the result of suitable proceedings seasonably taken in the action itself, or on appeal from the judgment; but jurisdiction irregularly obtained is nevertheless jurisdiction—the power to hear, decide, and adjudge—and when this exists the judgment cannot be void. This conclusion inevitably results from the principles announced in the former part of the opinion. Were it not for the case of *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798, we should content ourselves with the foregoing observations, and affirm the judgment appealed from without further remark; but that case, when tested by these principles, seems to us to be so manifestly ³²⁷ wrong that we deem it not improper to indicate our views upon the principal point there decided. In the *Hauswirth* case, the supreme court of the territory of Montana decided that the service of a summons on Sunday was void, and that a judgment by default against the defendant, founded upon such service, was a mere nullity, although the sheriff's return stated that the service was made on Saturday. It was held that the defendant might maintain a suit in equity to have the judgment set aside on the ground that the service was made on Sunday. We are satisfied that the doctrine there announced is erroneous. Service of summons on Sunday is not a nullity, but a mere irregularity with respect to the time or day on which it was made, and a judgment based upon it is not void. While perhaps not directly in point, *Comer v. Jackson*, 50 Ala. 384, and *Hammond v. Wilder*, 25 Vt. 342, strongly support this reasonable and just view. If the *Hauswirth* case announces the true rule of law, then titles acquired under proceedings based upon judgments

by default are subject to attack at any time and must be declared void whenever it appears that the summons was served on Sunday. For example: In an action upon a promissory note, the summons is served upon Sunday, but the return states that service was made on Monday; default is regularly entered, and judgment follows; sale is had under execution; title to the property professedly passes to A, who conveys to B, and B to C. In the course of time the value of the property increases enormously. The judgment debtor now seeks to have the judgment declared a nullity for the reason that the summons was served on Sunday, a nonjudicial day. Under the holding in the Hauswirth case the attack must be successful, the judgment and all proceedings thereafter are nullities, and the judgment debtor has the title which by the execution sale professedly passed from him to the purchaser; and, even if the summons had in truth been served on a day other than Sunday, it is possible to conceive of circumstances in which, long after the judgment was entered, and the sale made, the contrary might be proved, thereby destroying that ³²⁸ which, for aught the purchasers were able to discover, was a perfect title. Such is necessarily the logical result and effect of that decision, notwithstanding the remarks on page 213 (6 Mont., and 9 Pac. 804), touching the assignment of a void judgment, and the rights of "innocent third persons" upon execution sale under a judgment void ab initio. The law does not offer a premium for perjury, and should not permit mere irregularities, which have been waived by the only persons entitled to complain, to overturn solemn judgments rendered on personal service of summons. The serving of a summons is a ministerial act in aid of judicial proceedings. Service made on Sunday is voidable; it will be quashed or set aside when the proper motion in that behalf is promptly and seasonably interposed; but, like any other mere irregularity or imperfection, it may be waived. By inaction on the part of the person who might have sought to be relieved of its effect, it is acquiesced in, cured, or waived; it is then no longer voidable, and the privilege of taking advantage of it is forever lost. So with the service of the summons in Conhain against Burke. The defendant in that case had the right to move that the service be set aside, and the motion, if made, should have been granted, unless the affidavit were amended, or a new one filed, stating that Burlingame was over eighteen years old at the time of service; and, perhaps, on appeal from the judgment, relief

would have been obtained, although no such motion had been interposed; but Burke cannot otherwise, either upon collateral or direct attack, successfully impeach the judgment because of the irregular service, or because of the defect in the proof of service.

We are not advised of any other case in this state which announces a rule different from the one applied in the case at bar. *Choate v. Spencer*, 13 Mont. 127, 40 Am. St. Rep. 425, 32 Pac. 651, was, as the opinion states, a direct attack by a bill in equity upon a judgment based upon a summons not attested by the seal of the court from which it issued, and the judgment was for that reason declared void, the court holding that the paper purporting to be the process ³²⁰ of the court was a nullity. *Sharman v. Huot* and *Sharman v. Eukes*, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558, were appeals from orders discharging a writ of attachment on the ground that the supposed summons was not authenticated by the signature of the clerk, the court holding that the summons was a nullity, and that under section 890 of the Code of Civil Procedure a writ of attachment which is issued before a valid summons is absolutely void, and not merely voidable. In *Layton v. Trapp*, 20 Mont. 453, 52 Pac. 208, it was held, on certiorari to review the judgment of a justice of the peace, that the service of the summons must be proved by the affidavit of the person making it, and, such an affidavit not having been made, the justice had no jurisdiction to render the judgment by default. The court said that since the justice's court is a court of inferior jurisdiction, and there are no legal presumptions in favor of its jurisdiction, its jurisdiction must affirmatively appear on the face of the record. *Sanford v. Edwards*, 19 Mont. 56, 61 Am. St. Rep. 482, 47 Pac. 212, likewise involved the validity of a judgment rendered by a justice of the peace, the court holding that under the statutes then in force, providing that in actions before a justice of the peace summons must be served by reading it to the defendant personally, or by leaving a copy at his place of residence, the delivery to the defendant of a copy of the summons without reading it to him, or leaving a copy at his place of residence, was not sufficient service, and that a judgment based on a return showing a delivery only was void. *Palmer v. McMaster*, 8 Mont. 186, 19 Pac. 585, is clearly distinguishable from the case now before us, for, while the attack upon the judgment was collateral, the judgment was based upon an at-

tempted service of summons by publication, and in such a case the proceeding is not one in accordance with the course of the common law, nor in the exercise of the ordinary jurisdiction of the court. The judgment was declared void in the last-named case upon the principles declared in *Galpin v. Page*, 18 Wall. 350: "Whenever, therefore, it appears from the inspection of the record of a ³³⁰ court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. . . . When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the state nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions." It is apparent that the rule applied in that case is based upon a principle different from the one governing the case at bar.

The other assignments of error are without merit.

The judgment will be affirmed, and it is so ordered. Remittitur may issue forthwith.

Collateral Attack upon Judgments is discussed in the monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119. A judgment regular on its face cannot be attacked collaterally for an irregular service of summons: *Bennett v. Wilson*, 133 Cal. 379, 85 Am. St. Rep. 207, 65 Pac. 880. As against such attack, on the ground that the summons was insufficient, it must be presumed that another and sufficient summons was issued: *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525; *Bradley v. Drone*, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304. Consult, in this connection, *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422, 41 N. E. 931; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359. A judgment merely voidable or erroneous cannot be assailed collaterally: *Edmundson v. Independent School Dist.*, 98 Iowa, 639, 60 Am. St. Rep. 224, 67 N. W. 671; *Hall v. Sauntry*, 72 Minn. 420, 71 Am. St. Rep. 497, 75 N. W. 720; *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359. Such attack cannot be successful unless the judgment is void: *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 171, 27 Pac. 598; *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. Rep. 611, 26 N. E. 393. A judgment cannot be collaterally impeached unless the record shows the want of jurisdiction: *Williams v. Haynes*, 77 Tex. 283, 19 Am. St. Rep. 752, 13 S. W. 1029; and the jurisdiction is conclu-

sively presumed unless the contrary appears from the face of the record: *Gulickson v. Bodkin*, 78 Minn. 33, 79 Am. St. Rep. 352, 80 N. W. 783.

Jurisdiction.—The Fact of Service, not the proof thereof, gives a court jurisdiction: *Bank of Orland v. Dodson*, 127 Cal. 208, 78 Am. St. Rep. 42, 59 Pac. 584; *Herman v. Santee*, 103 Cal. 519, 42 Am. St. Rep. 145, 37 Pac. 509; *Cunningham v. Spokane etc. Co.*, 20 Wash. 450, 72 Am. St. Rep. 113, 55 Pac. 756.

Jurisdiction.—Defective Service of process, as affecting the jurisdiction of a court, is considered in the monographic note to *Sanford v. Edwards*, 61 Am. St. Rep. 485-496.

Service of Process on Sunday, or on other legal holidays, is considered in *Glenn v. Eddy*, 51 N. J. L. 255, 14 Am. St. Rep. 684, 17 Atl. 745; *Whitney v. Blackburn*, 17 Or. 564, 11 Am. St. Rep. 857, 21 Pac. 874; monographic note to *Sanford v. Edwards*, 61 Am. St. Rep. 488.

MULLINS v. BUTTE HARDWARE COMPANY.

[25 Mont. 525, 65 Pac. 1004.]

MINING CLAIM—SURFACE AND MINERAL RIGHTS—COTENANCY.—If, prior to the location of a quartz claim, the surface is occupied by several parties, who agree that one shall locate the claim for the benefit of all, and that after the issue of a patent conveyances shall be made to vest in each the full title to the surface occupied by him, and also the undivided interest in the minerals, and the agreement is performed except as to the conveyances of the surface, the occupants do not become tenants in common of the surface, although they do of the claim, save as between themselves. (pp. 431, 436.)

NOTICE.—POSSESSION OF A DEFINITE TRACT by one rightfully in possession or holding under a valid title is a constructive notice to subsequent purchasers and encumbrancers of whatever estate or interest in the land is held by the occupant, equivalent in its extent and effects to the notice given by the recording of his title. (p. 437.)

TITLE—RECORD AS NOTICE OF.—If the title under which an occupant holds has been put on record, and his possession is consistent with what thus appears of record, it is not constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, and has had no actual notice beyond what is thereby disclosed. (p. 439.)

TITLE—RECORD AS NOTICE—COTENANCY.—The actual occupancy of one tenant in common is the rightful possession of all, and if a title under which they might hold is of record and is consistent with the occupancy, the possession must be referred to the record, and will not be constructive notice of any other title. (p. 440.)

TITLE—RECORD AS NOTICE—COTENANTS OF MINING CLAIM.—If, according to their title as shown by record, certain persons are tenants in common of a mining claim, the occupancy by each of a separate portion of the surface, with the payment of taxes and the making of improvements, imparts no notice to sub-

sequent purchasers or encumbrancers that he claims a surface interest in severalty. (pp. 439, 440.)

DEED—CONSIDERATION—PRIOR UNRECORDED INSTRUMENT.—The recital in a deed raises a rebuttable presumption of the payment of a valuable consideration, and the burden of proof to show notice of an earlier made instrument not first recorded, or of an oral contract, rests upon the party claiming under the latter. (p. 442.)

VENDOR AND VENDEE—BONA FIDE PURCHASER.—If one who has notice of an outstanding equity conveys, either mediately or immediately, to one without notice and for a valuable consideration, such purchaser is entitled to protection. (p. 443.)

CONVEYANCE OF MINE—RECORD TITLE AS NOTICE. If the record title to a mine shows the owners to be tenants in common without reference to separate surface interests, and C., one of the owners, conveys an undivided interest to M., who conveys it to H., who conveys it to D., and subsequently to the recording of the deeds to M. and to H., but prior to the recording of the deed to D., C. conveys another undivided interest, with a lot thereon, to N., D.'s grantee is not charged with constructive notice of N.'s rights by the record of his deed. N.'s occupancy of the lot as lessee for about a year previous to the grant to him does not change this rule. (pp. 443, 444.)

L. P. Forestell and McBride & McBride, for the appellants.

G. W. Stapleton, John W. Cotter, and Charles R. Leonard, for the respondents.

526 PIGOTT, J. Mullins, the plaintiff, and the Butte Hardware Company, a corporation, one of the defendants, have appealed from a judgment and from orders denying motions for a new trial in an action for the partition of the Yellow Jack quartz lode mining claim.

On May 13, 1897, the claim, which is now within the corporate limits of the city of Butte, was located by one Cummings. When the location was made and for some time thereafter, Cummings, one Bowen, one Moss, one Hamilton, and perhaps others, were occupying parts of the surface ground, each having **527** a dwelling-house or other visible evidence of possession upon the part occupied by him. The principal purpose of making the location was to obtain title to the surface of the claim in order thereby to protect the occupants in their holdings and secure to them in severalty the ownership of the land used by them respectively. With this object chiefly in view, the occupants agreed among themselves that Cummings should locate the claim for the benefit of all, that each would contribute his proportionate share of the expenses incident to procuring title, and that when patent issued the proper conveyances would be made, the one to the other, in

order to vest in each full title to the surface ground occupied by him, and also to vest in him an undivided interest in the minerals in the same proportion as his surface holding bore to the entire surface. In compliance with the agreement the claim was located by Cummings. The receiver's receipt was issued on December 30, 1884, and recorded December 3, 1887. On December 21, 1893, the patent was issued to him and three others (including one Schwab), who had succeeded to the interests of certain of the occupants. The patent was duly recorded on January 17, 1894. The expenses were paid proportionately by those interested and the agreement fully performed, except as to the making of the deeds conveying the surface rights in severalty to the respective occupants, Cummings delivering deeds of conveyances whereby the undivided interests of the respective persons in the mining claim were transferred to them in the proportions theretofore agreed upon, and the legal title which Cummings should acquire by patent was assured to them according to their several undivided equitable interests. All the deeds were duly recorded, the last on October 1, 1883. None of these deeds to the original occupants described or referred to any surface ground interest as distinguished from undivided interests in the whole claim, nor did it in any way attempt to describe an interest in severalty. In 1885, Cummings made a deed to the defendant Nickel which, in addition to an undivided one-sixteenth interest in the Yellow Jack claim, purports to convey a parcel of land fifty by ⁵²⁸ two hundred and forty-three feet in area which had been occupied by Cummings; but, as will be seen, this is not important in so far as the rights of the appellants are involved.

Intermediate the location of 1879 and the issuance of patent, as well as subsequently, sundry deeds, mortgages, and other instruments were executed by the different owners to whom Cummings had, prior to 1884, conveyed undivided interests, in most of which the property conveyed or affected was described as undivided interests in the Yellow Jack lode claim, no reference being made to surface rights as distinguished or as held separate from the mineral interests. During all of this period, extending from a date anterior to the location down to the time when this action was begun, most of the respective occupants of the surface of the claim at the time of its location, and their successors in title, remained in open, visible, and notorious possession of, and paid taxes upon, the

parts of the surface originally occupied and which they had agreed to convey after patent so that each might own in severalty. Some of the occupants and their grantees—notably Bowen, McDermott, and Nickel—erected permanent and valuable buildings. After 1885 there were several meetings had for the purpose of carrying out the agreement made among the original occupants of the several parcels of the surface ground, but owing to the nonattendance of one or more of the owners nothing further was ever done. The superintendent of the Butte Hardware Company attended some of these meetings. Mullins is not shown to have had notice or knowledge of the attempts to consummate the original agreement.

In the consideration of these appeals we shall endeavor to confine ourselves to the points made by counsel. We feel justified under the circumstances of the case in the inference that any question not presented by counsel is waived or its solution deemed unnecessary. So viewing the case, the plaintiff's chain of record title may be stated as follows: Deed dated June 7, 1880, by Cummings, the locator, conveying to Moss an undivided one-half interest in the claim; mortgage dated January 23, 1882, by Moss to one Hauser, conveying the same undivided interest (and purporting to convey also a piece of ground in area sixty-seven by one hundred and twenty feet); sheriff's deed consequent upon sale under foreclosure of the mortgage dated July 10, 1883; deed dated November 29, 1889, by Hauser to one Davis, of an undivided half interest (subject to a prior deed of November 2, 1885, from Hauser to one Raymond purporting to convey the lot just mentioned); and deed made in 1895 by Davis to the plaintiff conveying all his interest (thirty undivided sixty-fourths) in the Yellow Jack lode claim. The record title of the Butte Hardware Company, so far as it is necessary to state it, stands thus: On June 18, 1880, Cummings conveyed to one Schwab an undivided one-fourth interest in the claim; on May 5, 1884, Schwab conveyed an undivided one-eighth interest to the Butte Hardware Company. The record titles of the respondents, the Bowen heirs, and McDermott, and Fitschen stand thus: Deed by Cummings conveying to Bowen one undivided eighth interest in the Yellow Jack lode claim, made and placed of record October 1, 1883; deed by Bowen conveying to McDermott one undivided sixteenth interest in the claim, made November 14, and placed of record November 15, 1883; deed by Bowen to Hauser and Fitschen purporting to convey

to them an undivided one-eighth interest in the claim, made and recorded December 29, 1884; agreement by Hauser, Fitschen, Cummings, and Schwab (grantees named in the patent) with Bowen, to convey to him when patent should be issued an undivided one-eighth interest in the claim, made December 29, 1884, recorded July 11, 1885; through mesne conveyances the respondents named are clothed with record title to certain undivided interests in the claim.

The title of Moss to an undivided thirty sixty-fourths interest in the claim having been thus vested in the plaintiff, he brought this action for the partition of the Yellow Jack lode claim, including the entire property conveyed by the patent, irrespective of any supposed surface rights other than those incident to, following, and covered by, the title to the claim as ³³⁰ located and patented. The answering defendants, acquiescing in the right of the plaintiff as their cotenant to a partition of the claim in so far as the minerals therein are concerned, insist, with the exception of the Butte Hardware Company, upon their exclusive ownership in severalty of the parts of the surface occupied by them and their predecessors in title, asserting that the facts made Cummings a trustee for them as to the minerals and as to the surface not actually occupied, constituted an oral partition of the occupied surface ground binding upon all of the original occupants, and created equitable titles as to the surface of which all persons had notice by reason of such occupation. The district court sustained the contention of the defendants, other than the Butte Hardware Company, and held that an oral partition had been made of the surface of the Yellow Jack lode claim, and that the surface ground claimed by the Bowen heirs, by McDermott, and by Nickel and others, had been orally partitioned and set apart to them.

We proceed to the consideration of every point made or suggested by counsel for the respondents:

1. The respondents contend that there was an oral partition of the surface ground among the several occupants, and that this has been shown by the agreement which was made in 1879, followed by the exclusive possession of the occupants and their successors, and the payment by each of them of the taxes levied upon the land embraced within his holding, and by subsequent acquiescence on the part of the equitable owners in the supposed agreement for an oral partition. As to acquiescence, suffice it to say that the evidence does not tend

to prove that Mullins or the Butte Hardware Company acquiesced in or ratified the former agreement. With respect to the agreement of 1879 and the continued occupancy thereunder of the persons who were then in possession, we are of the opinion that these facts did not constitute an oral partition. The location of a quartz mining claim confers upon the locator the right to the exclusive enjoyment of all the surface ground as well as of all the minerals within the lines of the claim (we are not ⁵³¹ considering any question of apex or extralateral rights)—in other words, the location of a mining claim carries with it the right to the exclusive possession of the surface ground within the boundaries of the location. The location is a claim to the exclusive possession of the surface ground as well as to the veins and deposits beneath the surface: *Talbott v. King*, 6 Mont. 76, 9 Pac. 434. Title to the Yellow Jack quartz lode mining claim embraced, of course, title to the minerals and the surface ground within its exterior boundaries. That title was obtained from the United States government, the initial step having been taken by Cummings when he duly located the claim. In locating it, however, Cummings was unquestionably acting on behalf of himself and others under an agreement which made him a trustee and created a trust enforceable in equity, the validity of which has been too often recognized and adjudicated to permit its serious discussion as a novel or doubtful proposition. As among the original parties to the agreement and as to all persons who have acquired interests with knowledge or notice of the equitable title of the beneficiaries under that agreement, the title of the original occupants and their successors is beyond reasonable controversy, and hence we do not concur in the statement of counsel that the principal issue is whether or not there was an oral partition of the surface of the Yellow Jack lode claim, but rather regard the question of notice as the more important.

If the original occupants of the claim could in equity properly be treated as tenants in common of the entire claim or of its surface, or some part thereof, the question of their rights as among themselves could be easily solved by applying the principle recognized in *Mathes v. Nissler*, 17 Mont. 177, 42 Pac. 763. But they cannot be so regarded. Between the time of the inception of their occupancy and the time when the claim was located, none of them had any title, or any right except that which attends the naked possessor; after the location by Cummings, their trustee, they acquired equitable rights

gauged by the increasing and ripening title ⁵³² of their trustee; but from the mere germinal stage of Cummings' record title to the day of trial there was never, as among the parties themselves, any joint interest or tenancy in common as to the occupied surface resulting from any of the relations existing among them. Whatever rights they had at any time as to the surface were, as among themselves, in severalty at all times. After the location and prior to the conveyances by Cummings to them, they were, of course, as among themselves, tenants in common of the minerals beneath the surface and of the unoccupied surface, but that common interest was also an equitable one, and arose out of and resulted from the same oral trust contract which created their rights in severalty as to the surface of the claim or such parts of it as were covered by the contract between the occupants. If, therefore, they had any equitable interests as to the mining claim before receiving conveyances from Cummings, the actual locator, their rights at that time were because of, and coextensive with, the trust agreement, and their rights in severalty as to the surface were as well defined and as well founded as were the rights which they similarly and simultaneously were acquiring to the minerals; hence, if the locator of the mining claim represented himself and others, and became trustee for all in whose behalf he was acting, and by reason of the relationship and their contribution of the expenses, his associates, though unnamed in the location notice, had equitable rights which he was obliged to recognize and which were enforceable in equity, so that his subsequent transfers to them were not mere gratuities, but were in recognition of contract rights and in fulfillment of contract obligations, then, for the same reason which made the transfers of the mineral rights obligatory, these persons were equally entitled to specific and separate estates in severalty in the surface of the claim under and by virtue of the trust agreement which was the sole source of all their rights. Their rights in the mineral interests were not greater than their rights to separate parts of the surface; both rested upon the same equitable foundation, and each was of equal rank with the other—they were ⁵³³ twin equities born at the same time, neither having any greater age or legal vitality than the other. Both of these distinct and definite equitable estates were created at the same time, and by the same mutual co-operative agreement, yet all through this litigation they have been discussed and treated

as of vitally different degrees of validity, one being unanimously admitted to be a vested right, and the other to be a mere expectancy dependent upon conformity to the technical principles regulating or applicable to the rights of tenants in common, whereas the proof discloses that if any of these persons, other than the locator, ever had interests in the property it was only by virtue of an agreement which particularly defined those interests to be in severalty in respect of the surface, as plainly and particularly as it defined those interests to be in common with respect to the minerals beneath the surface. The logical conclusion therefore is that, although Cummings and the persons to whom he granted undivided interests became, except as among themselves, tenants in common of the entire claim, no tenancy in common as the surface of the claim ever existed *inter sese*; and hence all dispute in respect of the sufficiency as among the occupants of a supposed oral partition is necessarily eliminated from the case. Prior to the conveyances by Cummings to them, the original occupants were, in equity, tenants in common of the Yellow Jack lode claim, save as to the parts of the surface occupied by them, and as to these each was in equity the owner of the surface possessed by him. Such, as among themselves, were their relations to the claim.

The second question is whether the persons whose equitable estates in severalty as to parts of the surface were so well founded as among themselves have preserved those rights in so far as the plaintiff and the Butte Hardware Company are concerned.

2. As among the parties to the agreement of 1879, there were, it is true, two distinct ownerships. There was ownership in the several lots and there was ownership of undivided interests in the minerals underlying the surface. But these ownerships ⁵³⁴ were equitable and existed only among the parties to the agreement and as to those who became purchasers or encumbrancers with knowledge or notice of the facts. The respondents contend that the visible, open, notorious, exclusive, and continued occupation in severalty by them and their predecessors in interest of parts of the surface ground was constructive notice of their equitable rights and titles. The law is well settled that the actual, visible, notorious, continuous, exclusive, and unequivocal possession of "a definite tract of land by one rightfully in possession or holding under a valid title is a constructive notice to subsequent pur-

chasers and encumbrancers of whatever estate or interest in the land is held by the occupant, equivalent in its extent and effects to the notice given by the recording or registration of his title": 2 Pomeroy's Equity Jurisprudence, sec. 615. Such possession is evidence of some right or title in the occupant, and is sufficient to put a subsequent purchaser or encumbrancer on inquiry as to the rights of the person then in possession. But this general rule is not always applicable. It has its exceptions. One of the exceptions is stated in section 232 of Webb on Record of Title thus: "Where a person occupies premises, and the record shows a conveyance under which he would be entitled to the possession, in such case his possession will be referred to the record title, and a subsequent purchaser will not be charged by it with notice of any other undisclosed title or equity which the occupant may have. The possession is a matter tending to excite inquiry, but the fact that the occupant has placed upon the public records written evidence of his right, with the terms of which his possession is consistent, arrests inquiry at that point, and reasonably informs the purchaser that he may rest upon the knowledge thus obtained. Thus, a wife was entitled to an interest in land by inheritance. A partition was had with other heirs, but the deed made thereupon was to both husband and wife, vesting the title of her portion in them as tenants in common; and as against lien creditors of the husband her possession was held notice of only an undivided half interest. So, where a mortgagee ⁵³⁵ is in possession under a recorded mortgage, a purchaser from the mortgagor will not by such possession be charged with notice of an unrecorded conveyance of the equity of redemption from the mortgagor to the mortgagee, unless by the terms of the recorded instrument the mortgagor was entitled to possession at the time of the last purchase." Mr. Wade, in his treatise on the Law of Notice, says: "Circumstances may arise where one having title to real estate, and being in possession under his title, may nevertheless be prevented from relying upon such possession as notice to subsequent parties. As, for example, where, in addition to the title under which the proprietor occupies the premises, and which either rests in parol or is unrecorded, the record also shows a title under which he would be entitled to possession. In such a case his possession will be referred to his record title in preference to any other, and the purchaser will not be affected with notice of any undisclosed title or interest which the possessor may

have. Thus, where a mortgagee is in possession under a recorded mortgage, a purchaser from the mortgagor will not be, by such possession, charged with notice of an unrecorded conveyance of the equity of redemption from the mortgagor to the mortgagee, unless by the terms of the recorded instrument the mortgagor was entitled to possession at the time of the last purchase": Wade on Law of Notice, sec. 297. "This exception is obviously just and reasonable. When a party places upon record an instrument, the provisions of which are consistent with his possession of the premises, while the circumstance of his being in possession undoubtedly has a tendency to excite inquiry in the minds of those contemplating a purchase, the fact that he has placed the evidence of his right to occupy upon record, where it is accessible to the whole world, arrests inquiry at that point, and plainly informs the purchaser that he may rest securely upon the knowledge already obtained": Wade on Law of Notice, sec. 298. In section 616 of Pomeroy's Equity Jurisprudence the doctrine is thus stated: "The decisions may be regarded as agreeing upon the conclusion, which also seems to be in perfect harmony with sound principle, that where a title ⁵³⁶ under which the occupant holds has been put on record, and his possession is consistent with what thus appears of record, it shall not be constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, and has had no actual notice beyond what is thereby disclosed." Among the cases which support this doctrine, and we find none to the contrary, are the following: *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Allday v. Whitaker*, 66 Tex. 669, 1 S. W. 794; *Wrede v. Cloud*, 52 Iowa, 371, 3 N. W. 400; *Holland v. Brown*, 140 N. Y. 348, 35 N. E. 577; *Rogers v. Hussey*, 36 Iowa, 664; *May v. Sturdivant*, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221; *Brown v. Volkening*, 64 N. Y. 83; *Griffin v. Hall*, 111 Ala. 601, 20 South. 485; *Plumer v. Robertson*, 6 Serg. & R. 184; *McMechan v. Griffing*, 3 Pick. 149, 15 Am. Dec. 198; *Kendall v. Lawrence*, 22 Pick. 542; *Bush v. Golden*, 17 Conn. 594, 602; *Commonwealth v. Lakeman*, 4 Cush. 597; 16 Am. & Eng. Ency. of Law, 1st ed., 803, and cases there cited. The purchaser is presumed to have relied upon the record: *Hull v. Diehl*, 21 Mont. 71, 76, 52 Pac. 782.

After the conveyances by Cummings, the original occupants and their successors in interest were, according to the title shown by the record, tenants in common of the entire Yellow

Jack lode claim. Tenants in common hold their lands by unity of possession, and each has the right to enter upon, occupy, and use the whole or any part of the common property. The possession of one is presumed to be for the benefit, and the maintenance of the rights, of all the cotenants: *Gunter v. Laffan*, 7 Cal. 589; *Brittin v. Handy*, 20 Ark. 404, 73 Am. Dec. 497; *Freeman on Cotenancy*, secs. 166, 248; *Carpentier v. Webster*, 27 Cal. 544. The occupancy of each was, therefore, consistent with the record title. We observe, in passing, that the provisions of section 502 of the Civil Code are without pertinency to the question under discussion—that of notice. In so far, at least, as persons other than the tenants themselves are ⁵³⁷ concerned, the actual occupancy of one tenant in common is the rightful possession of all the owners, and if a title under which they might hold is of record and is consistent with the occupancy, the possession must be referred to the record and will not be constructive notice of any other title. We cannot concur, therefore, in the argument of counsel to the effect that the possession by Bowen and his heirs and by McDermott and others of the portions of the surface which had been set apart to them by the agreement of 1879, the making of improvements thereon, the payment of taxes, and the open exercise of rights of exclusive ownership, were notice of the titles, other than those appearing of record, under which they were occupying the property. All that was done was consistent with the rights of tenants in common. The possession was not unequivocal, and must be referred to the recorded deeds of conveyance creating or evidencing a right to enter and remain in occupancy of the land. We are of the opinion, therefore, that the occupancy and the making of improvements did not serve to charge the appellants with constructive notice. The suggestion that the records of the county treasurer's office showing that each of several occupants paid taxes on the parcel of ground in his possession were sufficient to put the appellants upon inquiry has already been considered, but may be further answered by saying that such records are not, of themselves, constructive notice to purchasers or encumbrancers of the fact that certain persons have paid taxes. We are not advised of any statute which declares the record of the payment of taxes to have that effect.

3. It is contended, however, that the burden of showing that they purchased for a valuable consideration and without

notice rested upon the appellants, and that unless such proof was made the respondents must prevail. Sections 258, 259, and 260 of the fifth division of the Compiled Statutes of 1887 provide, in substance, that every conveyance and every instrument setting forth any agreement to convey any real estate shall, from the time it is filed for record, impart notice ⁵³⁸ to all persons of its contents, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice; and that every such conveyance which shall not be recorded shall be deemed void as against any subsequent purchaser in good faith and for a valuable consideration whose own conveyance shall be first recorded. Sections 1640, 1641, and 1644 of the Civil Code declare that every conveyance of real property is, from the time of its filing for record, constructive notice of the contents thereof to subsequent purchasers and mortgagees; that it is void as against any subsequent purchaser or encumbrancer in good faith and for a valuable consideration whose conveyance is first recorded, and that an unrecorded instrument is valid as between the parties and those who have notice thereof.

Oral agreements affecting the title to real property, being incapable of record, are certainly not within the express language of these sections. They are, however, within those equitable principles under which the rights of innocent purchasers are enforced as against secret equities, whether arising from an oral contract or an uncertified instrument, neither of which is susceptible of record, or from an instrument certified but not recorded; and while such equities are not within the very words of the registry act, they are within its plain purpose and spirit, law and equity going hand in hand. Manifestly, "so far as the object of requiring registration is to protect purchasers in good faith, and give simplicity and certainty to the title to real estate, it must be frustrated whenever secret trusts or equities, whether arising by deed or without it, are allowed to prevail against conveyances duly recorded": 2 Leading Cases in Equity, 139. The right created by a prior unrecorded instrument, even though it purports to convey and does transfer, as between the parties to it, the legal title, should, as to purchasers without notice, be regarded "as tantamount to an equitable interest, which may, therefore, be cut off by a subsequent purchaser or encumbrancer who is in all respects bona fide, and who has also obtained the first record" (2 Pomeroy's ⁵³⁹ Equity Jurisprudence, sec. 758), when the

statute requires prior recordation. There is no reason why equities not arising by a written instrument should occupy a better position and be more tenderly regarded than equitable interests which rest upon writings.

In the case at bar each appellant claims title to an undivided interest in the land by a deed of conveyance purporting to have been made for a valuable consideration. In *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782, the purchaser of the later though first recorded mortgages proved that he paid a valuable consideration, but there was no other evidence tending to establish that he was without knowledge or actual notice of the prior mortgage. In that case the court said: "Whether the burden of proving the payment of a valuable consideration is upon the person claiming under a conveyance recorded before the record of a prior conveyance is not presented for decision in this case, and we express no opinion. We are, however, satisfied that the good faith of the purchaser will sufficiently appear by proof of the record of conveyances showing title in his grantor at the time of the purchase, upon which record he had the right to rely, and is presumed to have relied. If he had actual notice of the prior conveyance, this is a fact affirmative in its nature, and it is, therefore, more reasonable to require it to be shown by the party claiming under the prior unrecorded deed than to call upon the purchaser to prove the negative." Nor is it necessary in the present case to determine whether the burden of proving the payment of a valuable consideration is cast by the law upon the subsequent purchaser holding under a deed first recorded, for, as we have stated, the deeds to the appellants recited the payment of valuable considerations, and the doctrine is clearly established upon principle and by the weight of authority "that one claiming title to land by a deed to him purporting to be made for a valuable consideration is presumed to be a purchaser in good faith, without notice of prior unrecorded deeds; until the contrary is shown; and that the burden of proof to show notice and want of good faith is ⁵⁴⁰ on the party attacking the deed": *Anthony v. Wheeler*, 130 Ill. 128, 22 N. E. 494, 17 Am. St. Rep. 288, note. The respondents sought to establish rights to the Yellow Jack lode claim in hostility to the title of record; they were therefore bound to prove notice to the holders of the titles of record of the facts upon which their supposed rights were founded. If the burden devolved upon the appellants to show that they paid value,

the burden was *prima facie* discharged when the recorded deeds under which they held were introduced. In addition to those already referred to, we select the following cases as supporting the doctrine that the recital in the deed raises a rebuttable presumption of the payment of a valuable consideration, and that the burden of proof to show notice of the earlier made instrument not first recorded or of the oral contract rests upon the party claiming rights under the latter: *Hiller v. Jones*, 66 Miss. 636, 6 South. 465; *Wood v. Chapin*, 13 N. Y. 509, 67 Am. Dec. 62; *Ryder v. Rush*, 102 Ill. 338; *Hoyt v. Jones*, 31 Wis. 389; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Bush v. Golden*, 17 Conn. 594; *Roll v. Rea*, 50 N. J. L. 264, 12 Atl. 905; *Brown v. Volkening*, 64 N. Y. 83; *Hendy v. Smith*, 49 Hun, 510, 2 N. Y. Supp. 535; *Beman v. Douglas*, 1 App. Div. 169, 37 N. Y. Supp. 859; *Doodv v. Hollwedel*, 22 App. Div. 456, 48 N. Y. Supp. 93; *Holland v. Brown*, 140 N. Y. 348, 35 N. E. 577; and *Grantz v. Land etc. Improvement Co.*, 82 Fed. 387, 27 C. C. A. 305, 53 U. S. App. 499. The principle governing the decision in *Thamling v. Duffy*, 14 Mont. 567, 43 Am. St. Rep. 658, 37 Pac. 363, is inapplicable.

4. It is next contended that the Butte Hardware Company, through its superintendent, had either knowledge or actual notice of the agreement of 1879, and hence was not a purchaser in good faith. The company received its deed to an undivided one-eighth interest on May 5, 1884, and the deed was recorded on the same day. The evidence tends to show that the superintendent had actual notice of the equitable rights of the occupants after 1885, but does not tend to show that he had it prior thereto; so there is nothing to indicate that the company (assuming ⁵⁴¹ that notice to the superintendent was notice to it) had actual notice until after it purchased. True, Schwab, its immediate grantor to whom Cummings had conveyed and who is named in the patent as a grantee, had actual notice at the time he acquired his interest in the claim; but if one who has notice of an outstanding equity conveys, mediately or immediately, to a purchaser without notice who pays a valuable consideration, such purchaser is entitled to protection. This is an ancient and established doctrine in chancery courts. The rule prevails also under the recording statutes; and the company, having literally complied therewith, perfected its title as against the outstanding unrecorded equities.

5. It is also suggested that both Mullins and the company were charged with constructive notice of Nickel's rights by the record of his deed which conveyed an undivided interest in the whole claim and purported to convey also a lot thereon. This deed was made on March 16, 1885, and was recorded on June 16, 1885. As to the company, the record of the deed could not be constructive notice, for its deed from Schwab was delivered and recorded in 1884. Nor was it constructive notice to Mullins. Cummings conveyed an undivided interest to Moss, and the deed therefor was made and placed of record in 1880; Moss conveyed to Hauser by deed made and recorded in 1882; Hauser conveyed to Davis by deed made in 1889 and recorded in 1890; and Davis conveyed to Mullins by recorded deed dated in 1895. Although the deeds from Hauser to Davis and Davis to Mullins were executed after the record of the deed from Cummings to Nickel, the deed of Cummings to Moss and the deed of Moss to Hauser were duly recorded in 1880 and 1882, respectively, and long before the deed from Cummings to Nickel was made. In so far as constructive notice is concerned, the recordation of the deeds from Cummings to Moss and Moss to Hauser was sufficient to afford protection to Mullins as against Nickel's subsequently recorded deed from Cummings, despite the fact that the mesne conveyances under which Mullins asserts title were made and recorded after the conveyance by ⁵⁴² Cummings to Nickel had been recorded. The deed from Cummings to Moss, as well as the deed from Moss to Hauser, is Mullins' conveyance within the meaning of the statute, and it was duly recorded before Cummings conveyed to Nickel. The statute was satisfied. There is much conflict upon this question, but we are satisfied with the rule announced in *Hull v. Diehl*, 21 Mont. 71, 52 Pac. 782, and in *Hooker v. Pierce*, 2 Hill, 650. Nor does it seem that the deed to Nickel is in the chain of Mullins' title.

6. The further suggestion is made that the appellants were charged with constructive notice of Nickel's rights by his possession of the parcel of ground described in this deed from Cummings. We think not. When the lode claim was located, Cummings was occupying the lot. Cummings conveyed to Nickel on March 16, 1885. The evidence shows that when the deed was made, Nickel was living on the lot and had been "there about a year before" as lessee of Cummings. This falls far short of being sufficient evidence to warrant the in-

ference that Nickel was in possession at the time Schwab conveyed to the company or that he was occupying otherwise than as a mere tenant, and there is nothing to show that he was in possession under a contract of sale from the person who had theretofore by recorded deeds conveyed to the grantor of the company, and to others, undivided interests in the land whereon is situate the lot to which Nickel asserts title. Nor was Mullins charged with constructive notice of Nickel's occupancy. Undivided interests were conveyed by Cummings to Moss and by Moss to Hauser, and the deeds therefor were recorded long before Nickel went into possession. True, Nickel was in possession under his deed from Cummings when Hauser conveyed to Davis and when Davis conveyed to Mullins; but the evidence fails to show that Nickel had any right or interest in the property either when Cummings conveyed to Moss or Moss to Hauser. But even if Nickel, as between himself and Cummings and as to Moss, had a prior right to or interest in the land, Mullins' title is the better. A, the holder of the legal title of record, conveys or contracts to convey land in his possession to X; A then ⁵⁴³ conveys the same land to B (a purchaser with notice), who puts his deed on record; B conveys to C, who puts his deed on record; X then puts his contract or deed on record and for the first time enters into possession; while X is so the possessor, C conveys to D, who purchases for a valuable consideration and without notice of the rights of X, unless notice be charged by his possession or recorded deed. Is either the recorded deed to X or his possession constructive notice to D? We think not. While the possession of X at the time C conveyed to D would charge D with constructive notice, equivalent in effect to the record of a deed from C to X of whatever estate or interest X had under or from C (the record owner), yet neither the recorded deed from A (whose title of record had passed to C) to X nor the occupancy by X could be constructive notice to D of any title or right of X as against A or B. So far as D is concerned, X has no title, legal or equitable, and therefore no rights of which the constructive notice could be given.

The orders and the judgment appealed from are reversed, and the cause is remanded with direction to grant a new trial.

Title—Possession as Notice.—The actual, open, and visible possession of real property is constructive notice to a purchaser thereof of the rights of the possessor therein: Carr v. Brennan, 166 Ill. 108, 57 Am. St. Rep. 119, 47 N. E. 721; Corey v. Smalley, 106 Mich.

257, 58 Am. St. Rep. 474, 64 N. W. 13. See, further, *Tate v. Pensacola etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, and cross-reference note thereto, 20 South. 542.

Title—Record as Notice.—If the apparent possession of land is consistent with the record title, it is not a purchaser's duty to make any inquiry concerning the title beyond what the records show: *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167. The record of a deed from which it appears that less was conveyed than really was conveyed, imports notice of a conveyance only to that extent: *Sawyer v. Adams*, 8 Vt. 172, 30 Am. Dec. 459. Registry is notice of the tenor and effect of an instrument recorded only as it appears upon that record: *Shepherd v. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523. The possession of a grantor, after full conveyance, is not constructive notice to subsequent purchasers of any right reserved by him: *May v. Sturdivant*, 75 Iowa, 116, 9 Am. St. Rep. 463, 39 N. W. 221.

Vendor and Vendee—Bona Fide Purchaser.—A purchaser for value, without notice, from one who was a purchaser with notice, becomes a purchaser bona fide: *London v. Youmans*, 31 S. C. 147, 17 Am. St. Rep. 17, 9 S. E. 775. And a purchaser with notice from a purchaser without notice takes a good title: *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334, 1 South. 516.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

BURKE v. FIRST NATIONAL BANK.

[61 Neb. 20, 84 N. W. 408.]

TRIAL—DIRECTING VERDICT.—A verdict for plaintiff may be directed if a verdict for defendant cannot, for want of sufficient evidence, be permitted to stand. (p. 448.)

CHATTEL MORTGAGES—SALE BY MORTGAGOR.—If property under a chattel mortgage is sold by the mortgagor without authority of the mortgagee, the latter may either disavow the sale and retake the property, or he may ratify it and sue the mortgagor for the proceeds. (p. 448.)

Hall, McCulloch & Clarkson, for the appellants.

Brome & Burnett, for the respondent.

²⁰ **SULLIVAN, J.** This action was brought by the First National Bank of Pender to recover of George Burke and Frazier the sum of nine hundred and sixty-seven dollars, which, it is conceded, came into their hands as the proceeds of a sale of cattle made by them in the course of their business as livestock commission merchants. The jury, in obedience to a peremptory instruction, found the issues in favor of the plaintiff, and, judgment having been rendered on the verdict, the defendants bring the record to this court for review. The cattle in question were owned by F. J. Coil, who, in February, 1895, consigned them with other cattle to the defendants at South Omaha, where they were sold. The bank claims the proceeds of the sale under a chattel mortgage executed by Coil to its assignor, George F. Phillips, on September 19, 1894. Another ground upon which it asserts title to the

money is thus stated in the petition: "That said cattle were prior to said sale segregated by ²¹ the mortgagor Coil from other cattle shipped to defendants at that time in the presence and to the knowledge of said defendants, and defendants directed by said Coil to apply the proceeds of the sale of said cattle to the payment of said mortgage given to said Phillips." The action was defended on the theory that the cattle were not covered by the plaintiff's mortgage, but were covered by a prior mortgage given by Coil to George Burke and Frazier, and by them transferred to the American Bank Trust Company of Sioux City, Iowa. The allegation of the petition above quoted was denied, and the proof with respect to it was somewhat conflicting. But the evidence upon the other branch of the case justified the action of the trial court in directing a verdict for the bank. It is very clear that the Phillips mortgage was a lien on the cattle and that the other mortgage was not. Had the case been submitted to the jury, a finding in favor of the defendants could not be permitted to stand. This being so, it was not error to direct a verdict: *Hards v. Platte Valley Improvement Co.*, 46 Neb. 709, 65 N. W. 781. George Burke and Frazier having sold property upon which plaintiff had a lien, it might, of course, elect to ratify the sale and sue them for the proceeds; and this is precisely what it has done: *Jones v. Hoar*, 5 Pick. 285; *Gordon v. Bruner*, 49 Mo. 570; *Bliss on Code Pleading*, sec. 13. In this view of the case, it is not necessary to consider the alleged errors in excluding evidence in relation to admissions of Coil made at the time the cattle were sold.

The judgment is affirmed.

If a Mortgagor of chattels sells and delivers the property, he is guilty of a conversion: *Dean v. Cushman*, 95 Me. 454, 85 Am. St. Rep. 425, 50 Atl. 85. The rights and remedies of a mortgagor whose property has been wrongfully sold are considered in the monographic note to *Wygall v. Bigelow*, 16 Am. St. Rep. 499-503. The rights and remedies of a mortgagee against the impairment of his security are considered in the monographic note to *Webber v. Ramsey*, 43 Am. St. Rep. 432-436.

STATE v. STANDARD OIL COMPANY.

[61 Neb. 28, 84 N. W. 413.]

CORPORATIONS, FOREIGN—COMPELLING TO FURNISH EVIDENCE AGAINST ITSELF.—An action under an "anti-trust" statute, by "injunction, or other proper proceeding," to prohibit a foreign corporation from doing business in the state in contravention of such statute, is a civil action, both in substance and form. Therein the corporation may be compelled to furnish evidence against itself. (p. 450.)

CORPORATIONS, FOREIGN—EXCLUSION FROM STATE. INJUNCTION OR QUO WARRANTO may be employed to exclude a foreign corporation from the state, for committing an act denounced as criminal by its statutes. (p. 450.)

CONSTITUTIONAL LAW.—IN CONSTRUING STATUTES, all reasonable doubts must be resolved in favor of their constitutionality. (p. 450.)

CORPORATIONS, FOREIGN—ACTION TO OUST.—If a statute provides a civil action for ousting foreign corporations from the exercise of powers and privileges which they have criminally abused, such action is not an attempt to enforce the penalty provided by the statute for the commission of the criminal act. (p. 451.)

FOREIGN CORPORATIONS DO BUSINESS WITHIN THE STATE, NOT BY RIGHT, but by comity, and the state may, at pleasure, revoke the privilege granted by it to such corporation. (p. 451.)

CORPORATIONS, FOREIGN.—REVOCATION OF PERMISSION given to a foreign corporation to do business within the state is not the infliction of a penalty, nor the deprivation of a right. It is merely the cancellation of a license. (p. 451.)

C. J. Smyth, attorney general, for the state.

A. D. Eddy, J. M. Thurston, McCoy & Olmstead, and Woolworth & McHugh, for the respondent.

³¹ SULLIVAN, J. This is an original action instituted by the plaintiff to prevent the Standard Oil Company, an Indiana corporation, from continuing to do business in this state. The question now before us for decision arises on the attorney general's application for an order requiring the defendant to permit him to inspect and copy its books and records for the purpose of obtaining evidence to sustain the averments of the petition. Section 394 of the Code of Civil Procedure, under which the motion is made, provides: "Either party or his attorney may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession or under his control, containing evidence relating to the merits of the action or

defense therein. Such demand shall be in writing, specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the ³² demand within four days be refused, the court or judge, on motion and notice to the adverse party, may in their discretion order the adverse party to give the other, within a specified time, an inspection and copy, or permission to take a copy of such book, paper, or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such, as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper, or document when he is examined as a witness." The motion is resisted on the ground that the purpose of the action is to enforce a penalty or forfeiture, and that to grant the order would be to require the defendant to furnish evidence against itself in a criminal case. We are of opinion that the action is in substance, as well as in form, a civil controversy, and that the motion may be granted without violating that provision of the constitution which declares: "No person shall be compelled, in any criminal case, to give evidence against himself": Const., art. 1, sec. 12.. The petition charges that the defendant has violated the "anti-trust law" (Comp. Stats. 1899, c. 91a), and asks that it be, for that reason, enjoined from further prosecuting its business here. The first section of the act in question defines a trust; the second characterizes as misdemeanors and conspiracies against trade, all acts by any person or persons carrying on, or creating or attempting to create a trust, and provides punishment for the commission of such acts. The third section declares that any domestic corporation which has violated the statute shall forfeit its charter, and may be ousted from its franchises by quo warranto. The fourth section, so far as material to the present inquiry, is as follows: "Every foreign corporation or person not a resident of this state, violating any of the provisions of this act, is hereby denied the right and prohibited from doing any ³³ business within this state; and it shall be the duty of the attorney general and each county attorney within his county, to enforce this provision by injunction, or other proper proceedings, in any county in which such foreign corporation or nonresident person does business, in the name of

the state on his relation." It will be noticed that the second section of the law, in plain terms, prescribes penalties for the acts therein denounced as criminal; and it will be also observed that the third section provides a civil remedy on behalf of the state for the commission of these same acts. It is true that the forfeiture of the charter of a domestic corporation is a consequence of violating the law, but it is not a penal consequence.

The proceeding by quo warranto is a civil remedy; it is the means employed by the state to cancel and recall a privilege which the corporation proceeded against has abused: *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. Rep. 437; *State v. City of Topeka*, 31 Kan. 452, 2 Pac. 593; 2 Beach on Private Corporations, sec. 840. The fourth section is in substance like the third. It provides that a corporation domiciled in another state may, by reason of having done one or more of the criminal acts mentioned in the second section, be excluded from the state. The attorney general is authorized to proceed against it by injunction or quo warranto. The latter remedy, which is included in the phrase "other proper proceedings," may, with propriety, be resorted to for the purpose of preventing a corporation created in one state from doing business in another contrary to law: *Code Civ. Proc.* tit. 23; *State v. Western Union Mut. Life Ins. Co.*, 47 Ohio St. 167, 24 N. E. 392; 2 Beach on Private Corporations, sec. 841. In construing an act of the legislature all reasonable doubts must be resolved in favor of its constitutionality. If sections 3 and 4 provide penalties for crime, they violate the constitution and are absolutely void, for they deny the right of trial by jury (*Const.*, art. 1, secs. 6, 11; *State v. Moores*, 56 Neb. 1, 76 N. W. 530), ³⁴ and the right to a trial on an indictment or information: *Const.*, art. 1, sec. 10. Furthermore, a corporation can violate the law only by transgressing section 2. That section declares the penal consequences of the transgression, and it would not be competent for the legislature to add another penalty and enforce each by a separate action: *Const.*, art. 1, sec. 12. The true construction of sections 3 and 4 is that they are merely declaratory of the common law, and that they provide for ousting corporations by civil action from the exercise of powers and privileges which have been abused. The action is no more criminal than is an action for damages resulting from the

commission of a crime: *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936. Section 4, so far as it relates to citizens of other states, is an unlawful discrimination in favor of the citizens of this state, and invalid in any view of the case. There is another reason why the motion should be sustained. Foreign corporations do business here not by right, but by comity: *Paul v. Virginia*, 8 Wall. 168; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521. The state grants them a privilege which it may revoke at pleasure. When they exercise their franchises in contravention of our laws, the privilege is revoked, and, that fact being ascertained, judgment may be rendered excluding them from the state. The revocation of the permission given a foreign corporation to do business here is not the infliction of a penalty; it is not the deprivation of a right. The privilege is like any other license, and the withdrawal or cancellation of it in consequence of the commission of a crime is not punishment in a legal sense: *Martin v. State*, 23 Neb. 371, 36 N. W. 554; *Miles v. State*, 53 Neb. 305, 73 N. W. 678; *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531.

The motion is sustained.

Norval, C. J., expressed no opinion.

Foreign Corporations do not come into a state as a matter of right, but only by comity: *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577; *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033. A state may exclude them, and it is not prohibited from discriminating in the privileges it may grant them: *Scottish etc. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519.

The Forfeiture of Corporate Franchises is discussed in the monographic note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 179-202.

Quo Warranto is in the nature of a civil proceeding: Note to *McPhail v. People*, 52 Am. St. Rep. 312. See, also, *People v. Central Union Tel. Co.*, 192 Ill. 307, 85 Am. St. Rep. 338, 61 N. E. 428.

All Statutes are Presumed Constitutional: *Alabama etc. R. R. Co. v. Reed*, 124 Ala. 253, 82 Am. St. Rep. 166, 27 South. 19; *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703, 48 S. W. 305; and are to be upheld in cases of doubt: *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851; *Overshiner v. State*, 156 Ind. 187, 83 Am. St. Rep. 187, 59 N. E. 468. They should not be declared unconstitutional unless their violation of the constitution is so manifest as to leave no room for reasonable doubt: *State v. Layton*, 160 Mo. 474, 83 Am. St. Rep. 487, 61 S. W. 171; *Hanna v. Young*, 84 Md. 179, 57 Am. St. Rep. 396, 35 Atl. 674.

THOMPSON v. STATE.

[61 Neb. 210, 85 N. W. 62.]

CRIMINAL LAW—DEFENSE OF DOMICILE.—A man may defend his domicile, even to the extent of taking life, if actually or apparently necessary to prevent the commission of any felony therein. Such right of defense is not limited to the case of an assault with intent to take the life of the inmate, or of doing him great bodily harm. (p. 454.)

HOMICIDE—SELF-DEFENSE.—THREAT OF EXPOSURE of unnatural crime. The occupant of a dwelling may lawfully kill, as a necessary measure of defense, a person who attempts to break and enter therein with intent to obtain money from such occupant by taxing him with the commission of an infamous offense against nature, and threatening to expose him to public reprobation and contempt, even though he divines the purpose of such entry, or has notice of it. (p. 455.)

ROBBERY—THREATS OF INJURY TO REPUTATION.—Evidence that money or goods were obtained from a man by putting him in fear of an injury to his property or reputation, as by threatening to accuse him of an unnatural crime, is sufficient to establish the crime of robbery. (p. 455.)

INSTRUCTIONS, IF ERRONEOUS, ARE NOT CURED by giving correct instructions. The jury is not required to choose between conflicting instructions. (p. 456.)

CRIMINAL LAW.—PLEA IN ABATEMENT, based on the facts that the accused had two preliminary examinations, and that upon one he was held for a lower grade of crime than upon the other, forming the basis for the charge upon which he is tried, is demurrable. (p. 456.)

T. M. Wolcott and M. P. Kinkard, for the appellant.

C. J. Smyth, attorney general, and W. D. Oldham, deputy attorney, for the state.

²¹¹ SULLIVAN, J. In the district court for Cherry county Cicero H. Thompson was found guilty of murder in the second degree, and sentenced to imprisonment in the penitentiary for fifteen ²¹² years. The conviction apparently was the result of erroneous rulings, and must, therefore, be set aside. We cannot consider in detail all the specifications of error discussed by counsel. They are altogether too numerous to be given separate treatment. For the most part they depend upon a few principles which, if recognized and properly applied, will prevent on another trial a repetition of the errors of which the defendant complains.

On the night of the tragedy Thompson was alone in his cottage in the city of Valentine. About 2 o'clock A. M., Ar-

thur London, the deceased, with a companion named Milliman, rapped for admittance. Receiving no response from within, they broke open the door and were about to enter, when they encountered the defendant, who commenced shooting at them. Five shots were fired. Milliman fell in the storm-shed and London lay mortally wounded just outside the threshold. Two theories of the case were submitted to the jury. The theory of the defense was that all the shots were fired by Thompson in the belief that his home was being broken and entered by robbers. The state's hypothesis was that the defendant recognized London when he first sought to gain admittance, and knew that his purpose was to obtain money by threatening to publish a report to the effect that defendant was addicted to the practice of an abominable vice. It was also contended by the county attorney that the fatal shot was fired after London had retreated and while he lay helpless on the ground. There is no sufficient basis in the evidence for the theory that Thompson did the killing to protect himself from blackmail. There is nothing in the record from which it may be inferred that he knew, or had reason to believe, that the deceased intended on the night in question, or at any other time, to extort money from him by any species of intimidation. If it be true that London and Thompson had been accustomed to wallow together in the ooze and slime of a detestable sensualism, it does not by any means follow, as a natural or probable conclusion, ²¹³ that either would use his knowledge of the other's baseness as a means of obtaining money. The jury might, perhaps, have been justified in finding that the defendant recognized London before he shot him, but there was no sufficient evidence from which to conclude that the motive for the shooting was to prevent blackmail.

Some of the instructions touching the right of the accused to defend his habitation are erroneous. In the seventeenth paragraph of the charge it is said: "An assault on the house can be lawfully resisted to the extent of killing the assailant or assailants only in case the assault is made with the intent either of taking the life of the inmate or of doing him great bodily harm, and that such resistance was necessary to prevent such crime or in case the inmate acting honestly had reason to believe from the acts, facts, and circumstances, and in fact did believe that it was necessary to prevent the commission of such crime." The same thought is expressed in the eigh-

teenth paragraph. The doctrine of these instructions is not, we believe, sustained by any adjudged case, although there are dicta in the opinions of courts and expressions in the text-books on criminal law that seem to give countenance to it. The true rule undoubtedly is that a man may defend his domicile, even to the extent of taking life, if it be actually or apparently necessary to do so in order to prevent the commission of any felony therein: *Semayne's Case*, 3 Coke, 91; *Foster's Crown Cases*, 273; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Wright v. Commonwealth*, 85 Ky. 123, 2 S. W. 904; *State v. Taylor*, 143 Mo. 150, 44 S. W. 785. Whether this is the precise limit of the domiciliary right it is not here necessary to determine; but if it is the limit, then popular sentiment is not in accord with the law.

Another phase of the case seems to have been entirely overlooked at the trial. The right of the accused to resist an aggression having for its object the obtaining of money by threats of injury to his reputation was ignored. ²¹⁴ There is no good reason why the law should differentiate between a threat to inflict physical injury and a threat to cause mental suffering. One may diminish the value of existence quite as much as the other. Of this fact the criminal law has but a dim perception; it is seen, but not seen clearly. If the mental anguish is acute and in its very nature calculated to lower the tide of life, the law takes cognizance of it. It appears from the authorities, ancient and modern, that the extortion of money by threatening to smirch a fair reputation is so atrocious a wrong that it is generally regarded as robbery, especially if the vice or crime imputed is an unnatural one. This being so it would seem that if London and Milliman came to the defendant's house with the intention, as claimed by the state, of obtaining money by taxing him with the commission of an infamous offense against nature and threatening to expose him to public reprobation and contempt, he might lawfully kill them as a necessary measure of defense, even though divining their purpose, or having actual notice of it. Under these circumstances the breaking and entry would be felonious because done with intent to rob. Evidence that money or goods were obtained from a man by putting him in fear of an injury to his property or reputation may, it is said, be sufficient to establish the crime of robbery: 1 *Wharton's Criminal Law*, sec. 852; *Desty's American Criminal Law*, sec. 142d; 3 *Greenleaf on Evidence*, secs. 233, 234; *Long*

v. State, 12 Ga. 293; Britt v. State, 7 Humph. 45. "As to the fear of injury to the reputation," says Greenleaf (section 234), "it has been repeatedly held that to obtain money by threatening to accuse the party of an unnatural crime, whether the consequences apprehended by the victim were a criminal prosecution, the loss of his place, or the loss of his character and position in society, is robbery." The instructions precluded the jury from considering this aspect of the case, and thereby deprived the defendant of a valuable right.

The seventh paragraph of the court's charge is a defective ²¹⁵ definition of murder in the second degree. The attorney general does not defend the instruction, but contends that it furnishes no ground for reversal, because the elements of the crime were correctly stated in another instruction. This question is not a new one. It has been frequently decided by this court, and the rule is a just one and founded in good sense, that the jury should not be required to choose between conflicting instructions: First Nat. Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568; Carson v. Stevens, 40 Neb. 112, 42 Am. St. Rep. 661, 58 N. W. 845; Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077; Barr v. State, 45 Neb. 458, 83 N. W. 856; Metz v. State, 46 Neb. 547, 65 N. W. 190.

The demurrer to the plea in abatement was properly sustained. The fact that the defendant had two preliminary examinations, and that he was held only for manslaughter on the first, did not entitle him to immunity from prosecution for murder. The decision of the county judge furnished the basis for prosecuting the prisoner for one crime; the decision of the justice of the peace gave the right to put him on trial for another crime. There has never been any doubt about the power of the grand jury to return two indictments against a party grounded on the same criminal act; and no reason is suggested why an examining magistrate may not exercise, under the new procedure, the jurisdiction which the grand jury exercised under the old: Bartley v. State, 53 Neb. 310, 73 N. W. 744; Roby v. State, 61 Neb. 218, 85 N. W. 61.

The judgment is reversed and the cause remanded.

One has a Right to Defend His Habitation from assault, but it is only when such attack threatens the commission of a felony or great bodily harm to one of the inmates that life may be taken in defending it: See the monographic note to State v. Sumner, 74 Am. St. Rep. 740; Elder v. State, 69 Ark. 648, 86 Am. St. Rep. 220, 65 S. W. 938.

Robbery.—If one succeeds in extorting money from another by threatening to charge him with, or prosecute him for, sodomy, this is robbery, though there is no other fear than that of the loss of character: See the monographic note to *State v. McCune*, 70 Am. Dec. 186. Consult, in this connection, *Brown v. State*, 37 Tex. Cr. Rep. 104, 66 Am. St. Rep. 794, 38 S. W. 1008; *State v. Crowell*, 149 Mo. 391, 73 Am. St. Rep. 402, 50 S. W. 893.

SANDAGE v. STATE.

[61 Neb. 240, 85 N. W. 35.]

EVIDENCE OF DETECTIVES—WEIGHT OF TESTIMONY. The testimony of a detective employed to hunt up evidence against the accused must be weighed with greater care than that given by disinterested witnesses. (p. 458.)

CRIMINAL LAW—PRINCIPALS AND ACCESSARIES.—One indicted as a principal in a felony cannot be convicted as accessary before the fact, or, if indicted as an accessary, cannot be convicted as a principal. One indicted as principal in a burglary cannot be found guilty as such if he did not participate therein and only counseled and advised the commission of the crime. (p. 458.)

F. B. Donisthorpe, for the appellant.

C. J. Smyth, attorney general, and P. Pizey, for the state.

241 HOLCOMB, J. The plaintiff in error, defendant below, was informed against and convicted of the crime of burglary. The offense charged was alleged to have been committed by breaking into a chicken-house with intent to steal and stealing a number of chickens therefrom. The evidence on which the verdict is based is wholly circumstantial. The defendant resided at Harvard, Clay county, and was engaged in the business of buying chickens and reselling them to a poultry dealer doing business at Hastings. The offense is alleged to have been committed about seventeen miles from Harvard, in the county of Fillmore. The only direct evidence tending to show the defendant to have been at or near the place where the offense is alleged to have been committed, and in the county, was the testimony of one witness, residing in the neighborhood, who testified that on the day preceding the night of the alleged burglary the defendant called at his residence and made inquiries respecting the purchase of poultry. The testimony of this witness is effectually disproven by other and sufficient evidence showing the defendant to have been at home during the afternoon and evening of the day

mentioned. As to the testimony of the witness mentioned, it appears to have been a case of mistaken identity. It is abundantly established by the ²⁴² evidence that the defendant was in possession of the stolen chickens on the day succeeding the night of the burglary. He claims to have purchased them through his wife of one Viret Hawkins and one unknown person. The theory of the state is that the defendant, a brother in law named Ed. Clark, and the said Viret Hawkins, who appears to be a nephew of Clark, were all engaged in the burglary and larceny. That the defendant had guilty knowledge of the stolen property being such is, we think, fairly inferable from the record. Whether as a principal, accessory, or as one receiving stolen property knowing it to be such, it is not necessary or proper that we should undertake herein to determine.

On the trial of the case the state relied on the testimony of a witness who is a member of a detective association, and was engaged in procuring evidence to establish the guilt of the parties accused of the crime. The witness testified to his work as a detective, certain facts which were offered as tending to establish the guilt of the defendant, and to reputed conversations had between the detective and the accused relating to the offense with which he was charged. The defendant on the trial, and after the introduction of such testimony, requested an instruction to the jury, to the effect that, in weighing such testimony, greater care should be exercised in relation to the testimony of a detective employed in hunting up evidence, who is interested in or employed to find evidence against the accused, than in other cases, because of the natural and unavoidable tendency and bias of the mind of such person to construe everything as evidence against the accused, and to disregard everything which does not tend to support a preconceived opinion of the matter in which such person is engaged. The instruction was drawn in conformity with the rule as announced by Lake, C. J., in *Preuit v. People*, 5 Neb. 377, and should have been given. The testimony was clearly of the character which entitled the defendant to an instruction that it should be weighed with greater care ²⁴³ than that given by disinterested witnesses: *Kastner v. State*, 58 Neb. 767, 79 N. W. 713.

The jury were also instructed in the twelfth instruction given by the court on its own motion as follows: "You are instructed that if you shall find from the evidence that the

defendant obtained possession of the chickens, or some of them, that were stolen from Mrs. Brotherton, if in fact you find that any were stolen, and shall further find from the evidence that the accused had knowledge at the time of receiving said chickens that they had been stolen from Mrs. Brotherton, still you should find the defendant not guilty of the crime of burglary unless you further find that he participated in the burglary or that he counseled or advised the commission of the crime." By this instruction the jury were authorized to find the defendant guilty as a principal, although the jury may have found by the evidence that he was only an accessory to the crime. This, we understand, cannot be done under the laws of this state, which make the offense of an accessory independent of that of the principal, and a substantive offense in itself.

The defendant was charged with the crime of burglary, and by the jury was found guilty as charged. Under the instruction, this verdict was warranted, even though, as is more probable under the evidence as we understand the record, they believed he was guilty only of aiding, abetting, or advising the commission of the crime, and was the recipient of the fruits thereof. In *Casey v. State*, 49 Neb. 403, 68 N. W. 643, says Post, C. J., writing the opinion of the court (49 Neb. 406, 68 N. W. 644): "In those states where, by statute, the distinction between principals and accessories has been abolished, the accused may be charged either as a principal or an accessory before the fact, or both, at the option of the pleader; but in other jurisdictions, where, as in this state, the rule of the common law has not been relaxed, one not present or actually participating in the commission of the crime alleged, but whose offense consists in the aiding, inciting, ²⁴⁴ or procuring of its commission by the principal offender, should be charged as an accessory before the fact, and since, as has been said, 'the law never condemns without accusation, . . . one indicted as a principal in a felony cannot be convicted of being an accessory before the fact, or, indicted as such accessory, cannot be found guilty as a principal felon': 1 Bishop's Criminal Law, sec. 803. And in *Wagner v. State*, 43 Neb. 1, 61 N. W. 85, Irvine, C., citing Wharton's Criminal Law, 208, asserts as a familiar rule that no conviction as an accessory will lie under an indictment charging one as principal and vice versa."

It follows from what has been said that the judgment of

conviction cannot be sustained, but must be reversed and a new trial ordered, which is accordingly done.

Reversed and remanded.

The Credibility or Bias of Witnesses and the evidence admissible as bearing thereon are discussed in the monographic note to *Lodge v. State*, 82 Am. St. Rep. 25-68.

An Accessary before the act, under the Illinois and New York statutes, may be indicted and convicted as a principal: *Hronek v. People*, 134 Ill. 139, 23 Am. St. Rep. 652, 24 N. E. 861; *People v. Bliven*, 112 N. Y. 79, 8 Am. St. Rep. 701, 19 N. E. 638. See, also, *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655, 41 Pac. 998. In Texas, one charged as principal cannot be convicted as an accomplice: *Phillips v. State*, 26 Tex. App. 228, 8 Am. St. Rep. 471, 9 S. W. 557. See, further, the notes to *State v. Hildreth*, 51 Am. Dec. 375; *Harrel v. State*, 80 Am. Dec. 97.

STOVER v. STARK.

[61 Neb. 374, 85 N. W. 286.]

JUDGMENTS—REVIVOR—RES JUDICATA.—In a proceeding to revive a dormant judgment, every matter necessary to support any defense then possessed by the judgment defendant against the demands of the plaintiff on that cause of action is *res judicata* as having been litigated in the action wherein such judgment was obtained, and no objection can be urged or inquired into which goes behind the original judgment, unless directed to its validity. (p. 460.)

MORTGAGES—FORECLOSURE—PLAINTIFF PURCHASER—DEFICIENCY JUDGMENT.—A plaintiff purchaser in foreclosure proceeding may afterward sell the property for a sum equal to the amount of the decree and costs, without affecting his rights as to a deficiency judgment obtained in the foreclosure proceeding. (p. 460.)

J. H. Grosvenor, for the appellant.

Hainer & Smith, for the respondent.

374 HOLCOMB, J. In a proceeding in equity to foreclose a mortgage on real estate the appellant was made a party defendant, and sought to be charged with any deficiency that might exist after the sale of the mortgaged property and application of the proceeds thereof to the mortgage debt, it being alleged that the appellant, as grantee of the mortgaged premises, and as part of the consideration, had assumed and agreed to pay the debt secured by the mortgage on the premises purchased. In the proceedings had in the case, the appellant appearing, on application of the plaintiff and after sale, a judgment was rendered in the district ³⁷⁵ court against ap-

pellant for a deficiency remaining after the sale of the mortgaged property and the application of the proceeds to the mortgage debt in the sum of three hundred and thirty-six dollars and sixty-one cents. On appeal to the supreme court, the judgment thus rendered was affirmed: *Stover v. Tompkins*, 34 Neb. 465, 51 N. W. 1040. The judgment became dormant, and proceedings under the statute were instituted to revive it. Upon notice, appellant appeared and resisted the application for a revivor. All the questions presented by the objections to a revivor of the judgment, save one, were those litigated or necessarily involved in the prior proceedings, and as to all such questions they have become *res adjudicata* and cannot again, in this proceeding, be inquired into. As defendant in that case, appellant must be held to have litigated every matter necessary to support any defense he then possessed against the demands of the plaintiff for a deficiency judgment against him: *Stark v. Starr*, 94 U. S. 485. The rule that in proceedings to revive a dormant judgment no objection can be urged or inquired into which goes behind the original judgment not directed to its validity appears to be sound in principle and well established by the prior decisions of this court, as well as in other jurisdictions: *Wright v. Sweet*, 10 Neb. 190, 4 N. W. 1030; *Enewold v. Olsen*, 39 Neb. 59, 65, 42 Am. St. Rep. 557, 57 N. W. 765; *Nestlerode v. Foster*, 8 Ohio C. C. 70; *Van Fleet on Collateral Attack*, 1st ed., sec. 580.

The contention that because the mortgagee purchased the mortgaged premises under the decree, and afterward sold the same for enough to satisfy the decree in full with interest and costs, is a reason sufficient under equitable considerations why revivor should not be had, is not well taken. He might so purchase under the law, and when the sale was confirmed and the deed delivered, the property became his as any other, to do with as he desired, and whether afterward sold for more or less than under the decree cannot affect the rights of the parties in that proceeding.

The judgment must be affirmed.

In Proceedings to Revive a Judgment no defense can be made that existed anterior to the judgment. The defendant cannot go behind the judgment. The judgment cannot be questioned because of errors or irregularities in its rendition: See the monographic note to *Frierson v. Harris*, 94 Am. Dec. 239; though the defense that the judgment is void may be interposed: *Enewold v. Olsen*, 39 Neb. 59, 42 Am. St. Rep. 557, 57 N. W. 765.

NATIONAL LIFE INSURANCE COMPANY v. BUTLER.

[61 Neb. 449, 85 N. W. 437.]

MORTGAGES—NOTICE OF ELECTION TO ENFORCE SECURITY.—If a mortgage provides that the failure of the mortgagor to comply with any of its conditions shall cause the whole debt to become due, and that the mortgagee may then elect to proceed at once without notice to enforce his security, the commencement of a foreclosure proceeding is notice of such election, and no other notice is necessary. (p. 463.)

MORTGAGES—BREACH OF CONDITION.—PAVING ASSESSMENTS are assessments within the meaning of a clause in a mortgage imposing on the mortgagor the duty of making prompt payment of all "taxes and assessments" lawfully charged against the property, upon the failure of which the entire debt shall become due. (p. 463.)

MORTGAGES—BREACH OF CONDITION—RIGHT TO ENFORCE SECURITY.—If a mortgage provides that upon the failure of the mortgagor to pay delinquent taxes, assessments, and insurance, the mortgagee may make such payments and add them to the original debt, that the mortgage shall stand as security therefor, and that the mortgagee may thereupon declare the whole debt due, and sue to foreclose the mortgage immediately, he may not only make the payments for which the mortgagor is in default, but may also elect to declare the whole debt due, and proceed to foreclose the mortgage. (p. 463.)

EVIDENCE—TAX RECEIPTS.—An admission, when tax receipts are offered in evidence, that the taxes described in such receipts were duly levied and assessed, is an admission that the assessments were made at the date mentioned in the receipts. (p. 464.)

EVIDENCE.—TAX RECEIPTS for the payment of a special assessment are, per se, competent evidence of the date of such assessment as stated in such receipts. (p. 464.)

TAXES—WHEN DELINQUENT.—Payment of taxes before they become delinquent is not made by paying them on the day they become delinquent. (p. 465.)

C. O. Whedon and A. W. Scott, for the appellant.

S. L. Geisthardt, for the respondent.

⁴⁵⁰ **SULLIVAN, J.** This action was instituted by the National Life Insurance Company against John J. Butler and others to foreclose two real estate mortgages. Upon the issues joined the court found in favor of the plaintiff and rendered a decree in accordance with the prayer of the petition. The notes secured by the mortgage had not by their terms matured at the time the action was commenced, and the right to maintain the action is grounded only upon the alleged failure of the mortgagor, Butler, to comply with certain conditions of the mortgages relative to payment of interest, taxes,

and insurance. The conditions referred to are as follows: "It is further stipulated and agreed that if the taxes or assessments levied on the granted premises are not paid before they become delinquent, or if there is any failure to comply with the foregoing stipulation in regard to insurance, the grantee, its successors or assigns, may pay such taxes or assessments, or effect such insurance, and any sums of money paid therefor shall be recoverable from them or their heirs or assigns, and together with overdue interest shall bear interest at the rate of ten per cent per annum; that this mortgage shall stand as security not only for said mortgage note and interest coupons, but for interest upon all interest not paid when due, and for all sums of money advanced as hereinbefore stipulated for payment of insurance, taxes, and assessments, with interest on such sums so advanced; that a failure to pay any of the said money, either principal or interest, within thirty days after the same becomes due, or a failure to perform or comply with any of the foregoing agreements or conditions, shall cause the whole sum of money hereby secured to become due and collectible at once, without ⁴⁵¹ notice, if the mortgagee or its successors or assigns shall so elect, and this mortgage may thereupon be foreclosed immediately for the whole of said money, interest, and costs. . . . And it is hereby agreed that after any default in the payment of either principal or interest, the whole indebtedness secured by this mortgage shall draw interest at the rate of ten per cent per annum from the date hereof, and that all payments of interest that have been made shall be deemed to be payments on account only of such interest."

One of the contentions of appellants is that the action cannot be maintained because the plaintiff did not, before filing its petition, give notice of its election to declare the entire debt due. This question was considered in the case of *Northwestern Mut. Life Ins. Co. v. Butler*, 57 Neb. 198, 77 N. W. 667, and it was there held that the bringing of an action to foreclose the mortgage was notice of plaintiff's election, and that no other notice was necessary. In the same case it was also held that special paving assessments, like those involved in the present suit, were "assessments" within the meaning of a clause in the mortgage imposing upon the mortgagor the duty of making prompt payment of all "taxes and assessments" lawfully charged against the mortgaged property.

Another argument advanced in behalf of appellants is that

the plaintiff could not, under the provisions of the mortgages above quoted, pay delinquent taxes, assessments, and insurance, and, after adding the amounts paid to the original indebtedness, proceed at once to enforce the mortgages. We think by the plain terms of the contracts between the parties the creditor was given not only the right to make the payments which the debtor, in violation of his contract, failed to make, but also the further right at its option to declare the entire debt due and proceed immediately to collect it by suit.

It is contended that the court erred in including in the decree three hundred and forty-five dollars and fifteen cents for paying assessments which the plaintiff claims to have paid for the protection of his security. ⁴⁵² It is said that there is no evidence in the record tending to show that those assessments were regularly charged against the property, or that they were paid; and it is especially insisted that there is no proof that they were paid after they became delinquent. At the trial, plaintiff offered together all the receipts for taxes and special assessments paid by it upon the mortgaged property. The defendant made a general objection to the admission of each and all of the receipts, and objected specifically to those relating to the special assessments. Thereupon it was stated by Mr. Geisthardt, attorney for the plaintiff: "It is admitted that the taxes described in the receipts were duly levied and assessed by the proper authorities, and that the amounts named in the receipts were actually paid by plaintiff at the times the receipts bear date." The record further shows that Mr. Scott, attorney for the defendant, assented to the foregoing statement, and that the objection was then overruled. Evidently the admission was intended to embrace, and was understood by the court and counsel for both parties to cover, all the receipts included in the offer and affected by the objection. Those receipts show the date of each special assessment. The assessments are described by reference to the dates at which they were made, and that is the only means employed to identify them. The admission "that the taxes described in the receipts were duly levied and assessed" is, therefore, an admission that the assessments were made at the dates mentioned in the receipts. It also appears from the interest and penalties charged against the various installments of special taxes that they must have been delinquent when the plaintiff paid them. Furthermore, we are disposed to think that the receipts were per se competent evidence of

the dates of the assessments. Section 26 of the charter of the city of Lincoln, where the property is situate, provides (Sess. Law 1889, c. 14) that the city treasurer shall give to every person paying money into the city treasury a receipt specifying the date of payment and ⁴⁵³ upon what account paid. The accounts upon which plaintiff made payments were general taxes for certain years and special assessments which could be appropriately described only by reference to the dates at which they were levied. If the date of an assessment was an appropriate part of what the law required to be written in the treasurer's receipt acknowledging payment of such assessment, then the receipt was evidence of the date, and, unaided by any admission, would fix the time when the defendants were in default.

The plaintiff paid certain city taxes for 1896, the payment being made on the first day of December of that year. It is insisted by counsel for appellants that those taxes were not delinquent until the following day, and that the payment was premature and unauthorized. The statute provides: "On the first day of December next succeeding the levy thereof, all unpaid city taxes shall become delinquent": Comp. Stats. 1899, c. 13a, art. 1, sec. 52. If the taxes became delinquent on December 1st, the mortgagor was bound by his contract to pay them on or before the last day of the previous month. He could not pay them before they became delinquent by making payment on the day they become delinquent. The law does not ordinarily, in computing time, take notice of fractional parts of a day.

It is claimed that appellants were taxed with costs made by bringing unnecessary parties before the court. We do not find in the record anything to indicate that any costs were incurred in bringing the parties in question before the court. Neither do we find that any costs were charged against the defendants on account of those parties having been brought in.

The decree is not erroneous, and it is, therefore, in all things affirmed.

If a Mortgage Provides that in the event of default in the payment of interest the principal shall become due, notice need not be given to the mortgagor of an election to treat the whole amount of the debt as due. The election is manifested sufficiently by commencing a suit to foreclose: *Hawes v. Detroit etc. Ins. Co.*, 109 Mich. 324, 63 Am. St. Rep. 581, 67 N. W. 329; *Swearingen v. Lahner*, 93 Iowa, 147, 57 Am. St. Rep. 261, 61 N. W. 431.

PARMELE v. SCHROEDER.

[61 Neb. 553, 85 N. W. 562.]

MORTGAGES — FORECLOSURE — DEFICIENCY JUDGMENT—APPEAL.—No decree or judgment for a deficiency can be rendered until after the report of the sale of the mortgaged premises and the application of the proceeds to the satisfaction of the mortgage debt. The rendition of the deficiency judgment is a judicial function, and until it is exercised no appeal lies therefrom. (p. 468.)

MORTGAGES—DEFICIENCY JUDGMENT—RIGHT OF APPEAL.—A decree in foreclosure that if, on the incoming of the report of the sale of the mortgaged premises, the money arising therefrom is insufficient to satisfy the amount found due, the deficiency shall be specified, and upon application the mortgagee is entitled to a judgment for the deficiency and to execution therefor, is not a final judgment from which an appeal will lie. (p. 468.)

MORTGAGES — FORECLOSURE — DEFICIENCY JUDGMENT.—A final judgment for a deficiency in foreclosure proceedings cannot be rendered until after the incoming of the report of the sale of the mortgaged premises. If, though in form a deficiency judgment, it is in fact rendered before that time, it is a mere nullity, which does not conclude the rights of the parties thereto, and upon which execution may not issue. (p. 471.)

JUDGMENTS, FINAL—RIGHT TO APPEAL.—A decree is not final and appealable until the court has finally determined and disposed of the entire controversy between the parties, so that nothing remains to be done except to ministerially execute its provisions in the court in which it is rendered. (p. 471.)

JUDGMENTS—WHEN FINAL.—A decree, to be final, must be definite, certain, and capable of immediate enforcement, so that the subsequent proceedings are only the means of executing the decree. (p. 472.)

E. E. Aylesworth, Duffie, Gaines & Kelby, Duffie & Van Dusen, and Morris & Marple, for the appellants.

Beeson & Root, R. B. Windham, B. Clark, C. A. Rawls, and A. N. Sullivan, for the appellees.

554 **HOLCOMB, J.** We have heretofore decided that the appeal taken in this action should be dismissed because the decree as against the appellants was not final, and, therefore, not appealable: *Parmelee v. Schroeder*, 59 Neb. 553, 81 N. W. 506. A motion for a rehearing, accompanied by a very able brief, led us to the conclusion that there was sufficient merit in the contention of appellants' counsel to justify a re-examination of the question. We have taken pains to quite fully examine the authorities to which our attention has been called by counsel on both sides of the controversy, and after a care-

ful consideration of the subject in the light of all the information obtainable, we are more firmly convinced that the conclusions reached and announced in the first opinion are sound, well grounded in principle and should be adhered to.

The suit was an ordinary action in equity for the foreclosure of a real estate mortgage, the sale of the premises mortgaged to satisfy the amount found due and to charge the appellants personally with any deficiency that might remain after the sale of the mortgaged property and the application of the proceeds to pay the mortgage debt. The court found the appellants personally liable for the mortgage indebtedness, and in the decree it was adjudged that if the money arising from the sale of the property shall be insufficient to satisfy the amount found due, the ⁵⁵⁵ sheriff shall specify the amount of such deficiency, and that, upon confirmation of such report, the mortgagee, upon application, is entitled to a judgment for deficiency against appellants and entitled to execution for the amount of the deficiency found due. By section 847 of the code, as it existed prior to the amendment of 1897, it is provided: "When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of sale the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor"; and in section 849 provisions are made for bringing in other persons than the mortgagor, who may be obligated to pay the debt for the satisfaction of which the proceedings are instituted, and in the same manner to decree payment of any deficiency as to such other persons. While the appellants' counsel endeavor to make a distinction between the procedure under the two sections referred to, we are disposed to the view that the latter should be construed with reference to and in connection with the former, which is controlling as to the authority of the trial court to render a personal judgment in such proceedings. As to a judgment for a deficiency, it seems quite clear under these provisions that it cannot be determined or rendered until after a report of the sale of the mortgaged premises, a confirmation thereof

and a judicial determination by the trial court as to the amount for which the judgment may be rendered. In the proceedings and decree of foreclosure no judgment is in fact rendered against appellants. No amount of recovery is mentioned, nor is it sought to be determined. At most, the decree finds that a personal liability exists ⁵⁵⁶ against them, and decrees or declares that upon certain contingencies, which may or may not arise, a judgment may be applied for and obtained on the incoming of the report of the officer of the sale of the mortgaged property. It cannot, we think, be said that this is a final decree; that as to the issues between the appellants and the mortgagees, it disposes of the controversy between them, and leaves nothing to be done save to carry out and enforce the decree by those acting only in a ministerial capacity. It is only an interlocutory decree, litigating to a certain point the issues in controversy, where the litigation is suspended and leaves yet another and future judicial order and action to be taken before their rights are ultimately and finally adjudicated and determined. It has only the force and effect of a special finding or order that the appellants are liable upon the indebtedness for a judgment in personam if after the report of the sale of the property a deficiency exists. It lacks an essential element to make it a judgment or final decree in fact, and other and subsequent action by the court in the exercise of its judicial functions is absolutely necessary before there is a final adjudication concluding the rights of the parties and giving to it the character of a final order, decree, or judgment, from which an appeal will lie. The decree does not purport to award any personal judgment against appellants. They can in no way be injured or damaged until something further is done of a judicial character upon which a process can issue. No sum of money is awarded appellees upon which a general execution will rest, and no execution can issue. Nor can the decree as to appellants be enforced by ministerial acts to carry it into execution in the future. Further exercise of the power of the court acting judicially must be resorted to before the rights of the parties are effectually and finally determined with respect to a judgment in personam for any deficiency that may exist after the exhaustion of the security pledged for the payment of the debt.

⁵⁵⁷ This court is committed to the doctrine that no decree or judgment for a deficiency in a foreclosure suit can be

rendered until after the report of the sale of the mortgaged premises and the application of the proceeds to the satisfaction of the mortgaged debt. In the case at bar, the wording of the decree cannot, we think, be construed as a finality in decreeing or adjudging any recovery whatever against appellants. It only purports to decree that on the incoming of the report of the sale of the mortgaged premises, if the money arising therefrom be insufficient to satisfy the amount found due, the deficiency shall be specified, and upon application the mortgagee is entitled to a judgment for the deficiency and to execution for the same.

In *Clapp v. Maxwell*, 13 Neb. 542, 14 N. W. 653, it is held in the second and third paragraphs of the syllabus: "By a decree of foreclosure of a mortgage upon real estate, a court possesses no power to give a lien upon, or to affect any other property of the mortgagor until that included in the mortgage is exhausted"; and, "a general execution cannot be issued on a decree of foreclosure, except by order of the court, made on the report of sale, and for a deficiency ascertained after the mortgaged property is exhausted." In that case the decree adjudged and decreed that the mortgagee should have and recover of the mortgagor the amount of the debt found due, and yet the court held that as to any personal judgment attempted to be rendered, it was a mere nullity, and that such judgment could not be rendered until after report of the sale of the property mortgaged. Says Mr. Chief Justice Lake in the opinion: "The decision of the question of the plaintiffs' right to the injunction sought, independently of the incidental question of homestead, depends entirely upon the effect that must be given to the judgment in the foreclosure suit. If, as its form in part might indicate, it is really a judgment in personam, and effective as such, then it follows that the execution was properly issued, and the plaintiffs' right to relief is ⁵⁵⁸ contingent upon the possibility of the property levied upon being found to have been exempt from forced sale when they purchased it from the said Lucretia Altaffer." And after discussing the same provisions of the statute now under consideration, on page 546, he says: "Taking the entire decree together, we find that the court, after considering that 'the said plaintiffs recover,' etc., went on and provided minutely just how it should be done, but it was not by means of an ordinary execution. The decree provides that payment shall be made from the proceeds of a sale of the mortgaged prem-

ises, after the satisfaction of a prior lien. No provision is made for a deficiency, nor could there properly have been at that time. It is only 'on the coming in of the report of sale' that a deficiency can be ascertained and provided for. Therefore, taking the whole decree together, we are of opinion that, although in its wording somewhat informal, in effect it conforms substantially to the statute governing the foreclosure of mortgages, was not a lien upon property not embraced in the mortgage, and did not authorize the issue of the execution complained of."

In *Devries v. Squire*, 55 Neb. 438, 76 N. W. 16, it is held: "A deficiency judgment in an action to foreclose a real estate mortgage under the provisions of our Code of Civil Procedure, as it existed prior to the legislative session of 1897 (see Code Civ. Proc., sec. 847, Comp. Stats. 1895), could not be rendered until the 'coming in of the report of the sale' of the mortgaged property."

In *Brown v. Johnson*, 58 Neb. 222, 78 N. W. 515, it is said by Norval, present C. J: "The litigation of the liability for a deficiency could be as appropriately and satisfactorily carried on, and the question adjudicated, after the sale, as prior to the rendition of the decree. The usual and better practice is not to determine the liability of a defendant in a foreclosure for a deficiency judgment until after the report of the sale, when, for the first time, it can be definitely ascertained that a deficiency actually exists."

559 The case of *Millard v. Parsell*, 57 Neb. 178, 77 N. W. 390, cited in the first opinion under the issues formed and the decree rendered, is quite analogous to the one at bar, and it was there held: "An order that after exhausting the remedy against the principal debtor the creditor may apply for and obtain a judgment against a guarantor of collection is not final, and therefore not appealable." Says Mr. Commissioner Irvine, who wrote the opinion: "The court did not give judgment against the Ballous, but ordered that should there still remain a deficiency after subjecting the land in controversy to the payment of the Parsell judgment, plaintiff might then apply for and obtain judgment against the Ballous. The Ballous undertake to appeal from this part of the decree, but their appeal is premature. The two causes of action are entirely distinct, and the decree, so far as it affects the Ballous, is not final. There is no judgment against them yet; non

constat that there will ever be. If there should be, they may then have it reviewed."

In *Parr v. Lindler*, 40 S. C. 193, 18 S. E. 636, under a statute substantially the same as ours, it is held that a personal judgment for a deficiency in a foreclosure proceeding cannot be rendered until after the sale and a report thereof has been made, and that a personal judgment rendered in a decree of foreclosure is utterly null and void. Says McIver, J., in a concurring opinion: "If, then, as is most conclusively shown in the opinion of Mr. Justice McGowan, no personal judgment can be rendered for any deficiency until after the sale of the mortgaged premises, when alone the amount of such deficiency can be ascertained, it follows, necessarily, as it seems to me, that anything purporting to be a judgment for such deficiency, rendered before the amount thereof could possibly be ascertained, would be a mere nullity, and would afford no basis for an execution to enforce it. Indeed, it is utterly incomprehensible to me how a judgment for the payment of money could be rendered before the amount thereof had been, or could possibly be, ascertained. ⁵⁶⁰ Again, it seems to me that, after a sale of the mortgaged premises has been made, the question whether there is any deficiency, and, if so, the amount thereof, is a judicial question, upon which the mortgagor has a right to be heard, as grave and difficult questions might be presented as to the application of the proceeds of the sale of the mortgaged premises, which surely ought not to be left to the decision of a mere ministerial officer who makes the sale, but which should be determined by the court."

In 2 *Pingrey on Mortgages*, section 2029, the same doctrine is announced as to the rendition of a judgment for a deficiency.

The proper deductions from the foregoing are that a final decree or judgment for a deficiency in foreclosure proceedings cannot be rendered until after the incoming of the report of the sale of the mortgaged property, and that if in form a judgment is in fact rendered, it is a mere nullity, which does not conclude the rights of the parties thereto, or upon which execution may issue.

In *Keystone Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32, the question as to what is a final decree or order which is appealable has received very careful and thorough consideration, and many cases are cited in support of the

proposition that the decree is not final until the court has finally determined and disposed of the entire controversy between the parties, so that nothing remains to be done except to ministerially execute its provisions in the court in which it is rendered. Chief Justice Waite, in *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. Rep. 15, states the principle as follows: "The rule is well settled and of long standing that a judgment or decree, to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." To the ⁵⁶¹ same effect is *Dainese v. Kendall*, 119 U. S. 53, 7 Sup. Ct. Rep. 65, cited in the former opinion in the present case.

In any view of the question the rule seems to be that the decree, to be final, must be definite, certain, and capable of immediate enforcement, and that the subsequent proceedings are only means of executing the decree.

In *Longworth v. Sturges*, 6 Ohio St. 143, 154, it is said that in order that a decree shall be final, there must be a disposal of the whole merits of the cause and the suitors out of court, before a decree can acquire that character of finality which subjects it to review.

In *McGourkey v. Toledo etc. R. R. Co.*, 146 U. S. 536, 545, 13 Sup. Ct. Rep. 170, it is said by Mr. Justice Brown: "If, however, the decree of foreclosure and sale leaves the amount due upon the debt to be determined, and the property to be sold, ascertained and defined, it is not final: Citing *Railroad Co. v. Swasey*, 23 Wall. 405; *Grant v. Phoenix Ins. Co.*, 106 U. S. 429, 1 Sup. Ct. Rep. 414. A like result follows if it merely determines the validity of the mortgage, and, without ordering a sale, directs the case to stand continued for further decree upon the coming in of the master's report." And further on in the opinion it is observed: "It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not

final": Citing *Craighead v. Wilson*, 18 How. 199, and *Beebe v. Russell*, 19 How. 283.

It can hardly be said, we think, that it is not required, before the decree sought to be appealed from can be effective, or determine finally the rights of the parties, that a further order or entry, judicial in its nature, is required ⁵⁶² to be made, determining and fixing the amount of the deficiency and rendering judgment therefor.

We are referred to decisions by the supreme court of Wisconsin in support of the views contended for by counsel for appellants, but upon examination we find that the procedure in that state is regulated by statute, and that an order directing a personal judgment against a defendant or any deficiency after sale of the mortgaged premises is appealable, as it "involves the merits of the action," which fact determines the right of appeal, regardless of its finality.

The decisions of the supreme court of Michigan are also appealed to as sustaining appellants' position, but upon examination we find that in that state, while the practice is different, a decree of personal liability is held not to be final, but to be contingent and declaratory only of the future order, upon which a personal judgment may be rendered, and can fix no rights; that the jurisdiction of the court is to be exercised, and the trial of liability had on a new hearing, after the deficiency is reported: *Prentiss v. Richardson*, 118 Mich. 259, 76 N. W. 381; *Shelden v. Erskine*, 78 Mich. 627, 44 N. W. 146.

Without further citations of authorities, of which there are many, we are firmly of the opinion that the decree sought to be appealed from, as to appellants, is interlocutory in character only, and before it can be made effective and final, further judicial action is required of the court in which the proceedings are pending, which fact must be held to be decisive of the question of finality.

The judgment of dismissal heretofore rendered is adhered to.

Appeal dismissed.

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Judgments from Which an Appeal will lie are those which either terminate the action itself, or operate to divest some right in such a manner as to put it out of the power of the court to place the parties in their original condition after the expiration of the term: *Harrison v. Lebanon Waterworks*, 91 Ky. 255, 34 Am. St. Rep. 180, 15 S. W. 522. The right of appeal is limited in general to final judgments, and does not extend to interlocutory orders: *Davie v.*

Davle, 52 Ark. 224, 20 Am. St. Rep. 170, and note, 12 S. W. 558; Metzger v. Wooldridge, 183 Ill. 174, 75 Am. St. Rep. 100, 55 N. E. 694. The denial, in an action of foreclosure, of an application for the appointment of a special master commissioner to make a sale of the mortgage land, cannot be reviewed on appeal prior to the rendition of a final decree of foreclosure: American Investment Co. v. Nye, 40 Neb. 720, 42 Am. St. Rep. 692, 59 N. W. 355. The entry of a judgment is, as a rule, a prerequisite to the right of appeal: Daley v. Anderson, 7 Wyo. 1, 75 Am. St. Rep. 870, 48 Pac. 839.

SECORD v. POWERS.

[61 Neb. 615, 85 N. W. 846.]

JUDGMENTS—VACATION FOR FRAUD.—A judgment clearly shown to have been obtained by fraud, and which it would be against conscience to enforce, may, on the application of the defeated party and a showing of due diligence, be vacated and set aside. (p. 475.)

JUDGMENTS—VACATION FOR PERJURY.—The intentional production of false testimony may, in a proper case, justify the annulment of a decree or judgment resulting therefrom. (p. 475.)

TRIAL—ASSUMPTION AS TO ADVERSARY—PERJURY.—Each of the parties to a suit should anticipate that his adversary will offer evidence to support his allegations, and must be prepared to meet such evidence with counter proof. If he has an opportunity to do this and does not avail himself of it, he cannot obtain a retrial before another tribunal by charging that the judgment against him was procured by perjury. (p. 475.)

JUDGMENTS—VACATION FOR PERJURY.—A judgment will not be vacated on the ground that it was obtained by fraud and perjury, unless the defeated party alleges and proves due diligence by him at the former trial, and that his failure to obtain a just judgment was not owing to his own fault or negligence. (p. 476.)

T. H. Matters, for the appellant.

L. G. Hurd and S. W. Christy, for the respondent.

⁶¹⁵ SULLIVAN, J. The fundamental question involved in this litigation is the ownership of certain cattle, hogs, and other chattels, seized by Guy W. Secord, sheriff of Clay county, under an order of attachment issued out of the district court in an action brought by the Sutton National Bank against ⁶¹⁶ Thomas Powers to recover a money judgment. M. Louisa Powers, wife of Thomas Powers, asserted title to the property, and at her instance, or at least for her benefit, a motion was made to discharge the attachment. In support of this motion, which seems to have been eventually overruled, Mrs. Powers filed, not later than June 1, 1896, an

affidavit containing a detailed statement of her means and the sources from which they were derived, together with a circumstantial account of the transactions through which she acquired the possession and ownership of the attached property. She afterward instituted in the district court an action of replevin against Secord, which was tried in April, 1897, and resulted in a verdict and judgment confirming her claim to the cattle and hogs. After the adjournment of the term at which the replevin action was tried, Secord filed a petition under section 602 of the Code of Civil Procedure, alleging that the verdict against him had been obtained by perjury, and asking that the judgment in favor of Powers be set aside and a new trial awarded. Upon this petition there was a trial, which resulted in a decision denying the application to vacate the judgment. The record in each of the cases is now before us for review.

The only question discussed by counsel, and, therefore, the only one which we shall consider, is whether the evidence is of such a character as to justify the conclusions reached by the district court. We are fully satisfied that the evidence in the replevin action was sufficient to take the case to the jury, and that the finding in favor of the plaintiff, ratified as it is by the trial judge, should be approved and permitted to stand. And we are equally well satisfied with the decision in the equity case.

Secord was not under the necessity of relying entirely, in the replevin suit, upon the candor and integrity of Mrs. Powers. Her affidavit in the attachment case advised him of all the transactions that she had with the principal witnesses produced at the second trial. It was ⁶¹⁷ quite as easy for him to secure the attendance, or obtain the depositions, of these witnesses for the first trial as for the second. It seems, however, that he did not even take the trouble to consult them. He knew that the plaintiff would undertake to establish her claim of title, and he knew of the witnesses who might, perhaps, refute her claim; but he did not question them either in court or out of court. Evidently he made no adequate preparation for trial; he did not become diligent until after he heard from the jury. The fourth subdivision of section 602 aforesaid creates no new right; it is merely declaratory of the equity doctrine that a judgment clearly shown to have been obtained by fraud, and which it would be against conscience to enforce, will, on the application of the unsuc-

cessful party and a showing of due diligence, be vacated and set aside. The weight of authority doubtless is that a court of equity will not arrest the execution of a judgment founded upon false testimony which was considered and passed upon by the court or jury in the case in which the judgment assailed was rendered. In this state, however, the rule is that the intentional production of false testimony will, in a proper case, justify the annulment of a decree or judgment which is the product of such testimony: *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151; *Barr v. Post*, 59 Neb. 361, 80 Am. St. Rep. 680, 80 N. W. 1041.

But, as was said in *Barr v. Post*, 59 Neb. 361, 80 Am. St. Rep. 680, 80 N. W. 1041, it is not the policy of the law to encourage actions of this kind. There must be an end to litigation. A party cannot be permitted to experiment with his case at the expense of the public. He is not justified in assuming that his adversary will not produce evidence to make good the averments of his pleading. "Whenever an issue exists in any action or proceeding," says Mr. Freeman in his work on *Judgments*, volume 2, fourth edition, section 489, "each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counter-proofs. Where he has an opportunity to do this, and does not avail himself of it, . . . ⁶¹⁸ he cannot, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by perjury."

A statute of the state of Minnesota provides (Minn. Gen. Stats. 1878, c. 66, sec. 285) "that in all cases where judgment heretofore has been, or hereafter may be, obtained in any court of record by means of the perjury, subornation of perjury, or any fraudulent act, practice, or representation of the prevailing party, an action may be brought by the party aggrieved to set aside said judgment at any time within three years after the discovery by him of such perjury, subornation of perjury, or of the facts constituting such fraudulent act, practice, or representation." Considering this provision, *Gilfillan, C. J.*, in *Hass v. Billings*, 42 Minn. 63, 43 N. W. 797, after showing the necessity for a strict construction of the law, continues as follows: "When an issue is squarely made in a case, so that each party knows what the other will attempt to prove, and neither has a right, or is under any necessity, to depend on the other proving the fact to be as he himself

claims it—and such appears to be this case—the mere allegation by the defeated party that there was, as to such issue, false or perjured testimony by the successful party or his witnesses will not, as we think, bring his case within the meaning of the statute. The statute certainly could not have been intended to excuse a party from exercising proper diligence in preparing for trial. It does not appear by this complaint but that these plaintiffs could, with the least diligence, have ascertained how the fact was, and have produced ample evidence in respect to the character of the note of Sackett & Wiggins and the responsibility of the makers. It cannot be that the statute intended, in giving the action, to make unnecessary the ordinary prudence and reasonable diligence required in cases of application for new trials on the ground of surprise or newly discovered evidence.” In a later case in the same court (*Colby v. Colby*, 59 Minn. 432, 50 Am. St. Rep. 420, 61 N. W. 460), it was held that perjured ⁶¹⁹ testimony given by the plaintiff in support of the allegations of his complaint was not of itself sufficient to entitle the defendant to relief from a judgment procured by such testimony, if the facts testified to were not peculiarly or exclusively within the knowledge of the plaintiff.

From the evidence produced at the second trial it is established beyond doubt that if Secord failed to secure a just decision in the replevin action, the failure was chiefly due to his own carelessness or overconfidence. The trial court was right in refusing to vacate the judgment, not only because Secord did not make a sufficient showing of diligence, but also for the reason that the witness upon whose evidence he mainly relied was utterly unworthy of credit or confidence. The testimony of this witness seems to have been given by way of compensation and atonement for an affidavit which he had furnished the previous year to the defendant in the attachment suit. He did not testify like a person having any sentimental attachment to truth, but rather like one who felt no moral restraint, and was willing and anxious to render both litigants good service. His evidence is so contradictory and irreconcilable upon all material and immaterial points, it clashes with and impinges upon itself so often and in so many ways, that no discriminating judge would for a moment think of making it the basis of any judicial action. We do not think the evidence given on both trials, when considered together, shows anything more than a balance of probability

against the correctness of the conclusion reached in the replevin case.

Both judgments are affirmed.

Relief from Judgments on the ground of perjury is discussed in the monographic notes to *Pico v. Cohn*, 25 Am. St. Rep. 165-171; *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 232, 233. The intentional production of false testimony to establish a cause of action or defense amounts to such fraud as may entitle the adverse party to the vacation of the judgment rendered against him. He must, however, allege and prove that he exercised due diligence at the trial. He is not justified in assuming that his adversary cannot produce evidence in support of his contention, and he must be ready to meet the issue: *Barr v. Post*, 59 Neb. 361, 80 Am. St. Rep. 680, 80 N. W. 1041; *Munro v. Callahan*, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N. W. 151.

CHAMBERLAIN v. BUTLER.

[61 Neb. 730, 86 N. W. 481.]

INSURANCE, LIFE—ASSIGNMENT OF.—Any person has a right to procure insurance on his own life and assign it to another not having an insurable interest therein, provided it is done in good faith and not by way of cover for a wager policy. (p. 483.)

E. C. Hall, M. E. Cowen, J. W. Deweese, I. Reavis, and Davidson & Giffin, for the appellants.

F. Irvine, for the Home Life Insurance Company.

W. H. Kelligar, E. Ferneau, and A. M. Appelget, for the respondents.

⁷³³ **NORVAL**, C. J. Florence M. Butler, as administratrix of the estate of Robert L. Butler, brought action in the district court of Johnson county against Charles M. Chamberlain and the Chamberlain Banking-House, alleging in her petition, substantially, that said Robert L. Butler in his lifetime procured to be issued to him a policy of insurance on his life by the Home Life Insurance Company of New York, in the sum of five thousand dollars, payable to his executors, administrators, or assigns; that after the issuance of this policy said Robert assigned it to Chamberlain as security for the payment of a loan of seventy-five dollars made by defendants to said ⁷³⁴ Butler; that afterward Butler died, the insurance policy being at that time in full force, and that plain-

tiff, as the duly appointed administratrix of his estate, made due proof of the death of Butler, but the company refused to pay the amount of the policy to her, and had in fact paid it to one Crandall, to whom the policy had been assigned by Chamberlain, and that the latter had converted the policy and insurance to his own use; and she prayed for judgment against the defendants in the sum of four thousand nine hundred and twenty-five dollars, with interest and costs. Chamberlain answered, alleging that the policy was by Butler sold and assigned to him absolutely, for the sum of seventy-five dollars paid Butler by defendant, and that by such sale and assignment Chamberlain became the owner thereof, and paid all premiums and dues thereon from the time of assignment to the death of Butler; that after such death defendant assigned the policy to one Crandall, of New York, who prosecuted a suit in said state against said company on said policy, secured judgment for the amount thereof, which was by the company paid to Crandall in full; that when suit was commenced the insurance company gave due notice thereof to plaintiff, who failed to appear therein. To this answer a reply in the nature of a general denial was filed. On trial in the district court the following statement of facts (not copying unnecessary documents) was agreed upon:

"It is agreed that on the eighth day of December, 1891, the policy in controversy, then being in force and subsisting, was sold and assigned to the defendant Charles M. Chamberlain for the agreed price of seventy-five dollars; that an assignment thereof was then made and executed by said Robert L. Butler in due form, which was immediately forwarded to the insurance company to be examined, and if approved, recorded by the company in the office of its secretary; that afterward said assignment was so approved and recorded. The assignment in the first place, being executed in duplicate, both copies of the assignment being sent to the insurance company, and after the same was approved and recorded one copy was returned to the defendant ⁷³⁵ Chamberlain with an indorsement upon it that it had been recorded by the company, and immediately upon the receipt of the assignment thus approved and recorded the said twenty-five dollars were paid to said Butler by Charles M. Chamberlain; that said Chamberlain continued to hold and own said policy which was turned over to him with the assignment until the twelfth day of November, 1895, when the same was sold and assigned

and delivered to one Elbert Crandall, of the city of New York, by said Chamberlain by written assignment duly and properly executed at that time; which assignment is in words and figures as follows: [Here copy of assignment follows.]

"That on the twelfth day of November, 1895, said policy with said assignment to Crandall was forwarded to said Elbert Crandall at New York City, who thereafter brought suit in his own name in the supreme court of the county of New York in the state of New York, and recovered a judgment against the insurance company for the amount of the policy, interest thereon and costs; that after the commencement of said suit and before the trial thereof and before answer the plaintiff in this case was notified by the said insurance company of the pendency of said suit and she was requested to intervene and assert whatever interest she had in and to said policy. This she declined to do, alleging as her reason that she was financially unable to go to the state of New York and maintain her case. This plaintiff was not made a party defendant in the suit brought in the supreme court of New York and no service of summons was made upon her in that suit. After said judgment was rendered against said insurance company the same was collected by said Crandall, no part of the amount of which has ever been paid to or received by these defendants, or either of them. After the original assignment of said insurance policy to said Charles M. Chamberlain, and while he remained the holder thereof under said assignment, he paid the annual premiums thereon as follows, to wit: One hundred and thirty-five dollars and ninety-five cents ⁷³⁶ about the twelfth day of December, 1891; one hundred and thirty-five dollars and ninety-five cents on November 26, 1892; one hundred and thirty-five dollars and ninety-five cents on November 26, 1893; one hundred and thirty-five dollars and ninety-five cents on November 26, 1894.

"It is further agreed that after the death of said Robert L. Butler, which occurred on the twenty-ninth day of October, 1895, the plaintiff in this case notified the insurance company not to pay the amount of said policy to defendant Chamberlain, as administratrix of the estate of her husband. Both said Elbert Crandall and this plaintiff, as administratrix of the estate of her husband, made proof of the death of said Robert L. Butler and forwarded the same to the insurance company at its office in New York City and each demanded the payment of the amount of the policy from the company.

After the death of said Robert L. Butler, the insurance company notified the plaintiff that as the assignment to Chamberlain of the policy was recorded in their office that she was not the proper party to make the proof of death. That the said insurance company did not deny its liability to pay the amount mentioned in the policy.

"It also mutually agreed that Mr. Charles M. Chamberlain and Mr. Elbert Crandall are cousins."

On trial the court found in favor of the Chamberlain Banking-House, and rendered judgment against the defendant, Charles M. Chamberlain, and in favor of the plaintiff, for the value of the policy, less premiums paid, and the money paid by him to Butler. Chamberlain brings the judgment here for review.

Several interesting questions are presented in the briefs of counsel, but we think it unnecessary to decide more than one, owing to the position we shall take on it. While the petition alleges that the policy was merely pledged, it is agreed by the stipulation quoted that it was in fact sold and assigned absolutely by Butler to Chamberlain. If such assignment was valid, then the latter was the owner of it, and had the right to dispose of it as he saw fit. We think the law is that under the facts it was lawful for Butler to dispose of the policy. We are ⁷³⁷ aware that there is a sharp conflict of authorities in the several American courts relative to the validity of a sale of a life insurance policy by one having an insurable interest to one not having such interest. In all the states, perhaps, it is held against public policy for one not having an insurable interest to procure insurance upon the life of another, even though it be with the consent of such person. In some of the states it is held against public policy for one who has taken out insurance upon his own life to transfer it to one having no insurable interest. In some of the states such a transaction is prohibited by express legislative enactment. But the question to be decided is, Assuming that Chamberlain had no such interest in the life of Butler, could he legally buy the policy in question, such policy in its inception having been valid and taken out in good faith by Butler, with no intention or design on his part of assigning it subsequently to Chamberlain? Those courts which hold such a transaction void proceed on the ground of public policy. Originally, at common law, choses in action that were assignable were exceedingly few; but the tendency is now reversed,

and those not assignable are the exception rather than the rule. The modern policy being, then, as above stated, the reason for a rule contrary to such tendency should be exceedingly strong before a court, where the question is yet unsettled, should adopt a contrary rule in any given case. While public policy is a salutary thing, it has its limitations and dangers. Among them is the fact that it is an exceedingly indefinite term, has no lines of distinct demarcation, and may readily lend its aid to a court anxious to make a good case, rather than a safe precedent. For that reason, before a case is decided upon that ground solely, courts should be very sure that the reasons for so doing are clear, strong, and admit of no doubt concerning their reasonableness or applicability. Now, the principal reason for branding assignments of this nature as inimical to sound public policy is that the interest of a stranger in the death of the insured is ⁷³⁸ so strong as to tempt to murder of the latter, the earlier to participate in the avails of the policy. Such interest doubtless tends to such a desire. But the same desire would exist on the part of a creditor who has an insurable interest, or of one who advanced money on the policy, where his only hope of reimbursing himself for the loan might be the policy. It is exceedingly doubtful if strangers are any more apt to either desire or seek to accomplish the death of others than are those nearly related to them. The strength of this desire, where it exists, depends not so much upon the consanguinity of the parties as upon the moral stamina of him who holds the expectancy, be that expectancy an insurance policy, a devise, a remainder or other acquisition which may not be had until the death of another. Another reason sometimes assigned for holding such assignments illegal is that an assignee having no insurable interest is in the position of one who in the first instance takes out a wager policy. But we think not. If an insurable interest exists in the beneficiary at the time the policy is issued, and it is taken out in good faith, the object and purpose of the rule against wager policies would seem to have been sufficiently attained (16 Am. & Eng. Ency. of Law, 2d ed., 846); and there is no more reason to apply the rule to policies taken out in good faith and afterward assigned in good faith than there would be were the assured to retain it in his own hands.

Counsel rely upon Warnock v. Davis, 104 U. S. 775, as an authority to uphold the judgment of the lower court. That case and this present two very different questions. In that

case the insured took out the policy in pursuance of an agreement that a third party, having no insurable interest in his life, should, in consideration of certain payments to be made by it, receive at his death nine-tenths of the insurance money. In the opinion Justice Field says: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name." Under the facts involved ⁷³⁹ in that case, the language was appropriate, for there was collusion between the insured and the party to be benefited by his death by a receipt of the amount hereinbefore mentioned. But the language is not applicable to this case, for there was no agreement between Butler and Chamberlain, at the time the policy was procured, that the latter should participate in its avails. The transaction with him was wholly independent of and subsequent to the original one between Butler and the insurance company. If their agreement had existed prior to the issuance of the policy, or contemporaneous therewith, then the words quoted would be applicable, otherwise not. That this is the meaning of the words is clear when we read *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, and *Aetna Life Ins. Co. v. France*, 94 U. S. 561, 567. In the *France* case that court lays down the rule applicable to the facts in this case, viz., that any person has a right to procure insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy. The intention and good faith of the parties are the governing principles. In the *Schaefer* case the court held that a life insurance policy, originally valid, does not cease to be so upon the intermission of the assured party's interest in the life insured. It was certainly not intended in the *Warnock* case to overrule or modify either of them. They are not in conflict with that case, when the facts are remembered. The language of the court in the *Warnock* case is, unfortunately, somewhat misleading in several instances, although the ultimate conclusion reached is right. The comments therein on the New York cases (*St. John v. American Mut. Life Ins. Co.*, 13 N. Y. 31, 64 Am. Dec. 592, and *Valton v. National Fund Life Assur. Co.*, 20 N. Y. 32) are uncalled for, and not involved in the issues, for the questions of law decided in those cases are very different from, and not necessarily conflicting with the law involved in the *Warnock* case. We are aware that several eminent American courts disagree with the New York cases cited, and with other courts ⁷⁴⁰ of this

country which agree with the latter. It seems that to hold contrary to that rule would have the effect mentioned in *St. John v. American etc. Ins. Co.*, 13 N. Y. 31, 64 Am. Dec. 592, "without the right to assign, insurance on lives lose half their usefulness," a fact that should not be lost sight of in this day when almost every person carries life insurance of some character, the commercial value and usefulness of which should be fostered rather than crippled or minified. If such choses in action may be legally sold absolutely, it is plain that more can be realized from them, in the day of need, than if valuable only as security for loans. And until it shall be made to appear that in those jurisdictions where such policies are assignable absolutely, crimes committed by such assignees are more frequent than in those where assignments of the nature of the one here involved are illegal, we are of opinion that the reasons for holding such transactions void are insufficient.

Chamberlain then, being, under the facts agreed on, the absolute owner of the policy, had the right to transfer it to Crandall, and such act was not a conversion of the policy or insurance; for he was entitled to the whole of the proceeds thereof, free from all claims of the plaintiff, or the estate of deceased. The judgment is therefore reversed.

ASSIGNMENT OF LIFE INSURANCE POLICIES.*

I. Validity of.

- a. Generally.
- b. Where Prohibited by the Policy.
- c. Where but Part of the Proceeds of the Policy is Assigned.
- d. Where in Fraud of Creditors.
 1. Generally.
 2. Where Assignee is Wife or Child of the Assignor.
- e. Where Procured by Fraud, Duress, etc.

II. Formal Requisites of.

- a. May be Oral.
- b. Consideration.
- c. Assent of Assignee.
- d. Delivery.

*REFERENCES TO MONOGRAPHIC NOTES.

Assignment of insurance, when valid and what constitutes: 56 Am. Dec. 747-755.
Insurable interest in life of another: 57 Am. Dec. 93-105; 52 Am. Rep. 135-148.
Rights of creditors with reference to life insurance policies: 88 Am. Dec. 530-534.
Validity of assignment of life insurance to one who has no insurable interest in the life insured: 16 Am. St. Rep. 906-908.
Mutual benefit association: 19 Am. St. Rep. 781-791.
Insurance of life, when a fraud on creditors: 29 Am. St. Rep. 360-366.
Features of the law specially applicable to mutual, or membership, life, or accident insurance: 52 Am. St. Rep. 543-578.

1. Necessity of.
2. What Sufficient.
- e. Notice to and Assent of Insurer.
 1. Necessity of.
 2. Effect of, as Between Prior and Subsequent Assignees.
 3. Effect of, Generally.
 4. Where Required by Terms of Policy.
- f. Where Policy Prescribes Mode of Transfer.

III. Who May Assign.

- a. The Beneficiary.
 1. Generally—Vested Right to Policy.
 2. Where Policy is Payable to Second Beneficiary on Death of the First.
 3. Endowment Policies.
- b. The Assured.
 1. Where Right to Change Beneficiary is Reserved by Terms of the Policy.
 2. Where Policy is Payable to Assured or to His Personal Representatives.
 3. Where Policy is Payable to "Heirs" of the Assured.
- c. Right of Married Woman to Assign or Pledge Policy as Security for Debt of Husband.
- d. Right of Wife to Assign Policy on Husband's Life under Act Exempting It from Claims of Creditors.
 1. Generally—New York Doctrine.
 2. Under Acts Enabling Married Women to Assign Property.
 3. Under Later New York Statutes.

IV. Who may be Assignee.

- a. One Without Insurable Interest.
 1. Generally—Conflict of Authority.
 2. Grounds of Opposing Views.
 3. When Death of Assured has Occurred.
- b. Creditor Taking as Security.

V. Effect of.

- a. Title of Assignee.
- b. Right of Assignee to Sue in His Own Name.
- c. Where Assigned as Security.
 1. Interest of Assignee.
 2. Transfer Apparently Absolute may be Shown to be for Security.
 3. Amount Recoverable from Insurer by Creditor.
 4. Title to Proceeds in Hands of Creditor.
 5. By Whom Premiums are Payable.
- d. Invalid Assignments.
 1. Effect upon Policy.

2. Recovery of Premiums Paid by Assignee.**a. Conflict of Laws.****VI. Certificates of Membership in Mutual Benefit Associations.****a. Nature of.****b. Assignability of.****c. Requisites to Assignment of.****d. Who may Assign.****e. Who may be Assignee.****1. One Without Insurable Interest.****2. One Outside Designated Class of Beneficiaries.****f. Effect of Assignment of.****I. Validity of.**

a. Generally.—Life insurance is a contract by which the insurer, for a certain sum of money or premiums proportionate to the age, health, profession, and other circumstances of the person whose life is insured, engages that if such person dies within the period limited by the policy, the insurer will pay the sum specified in the policy, according to the terms thereof, to the person in whose favor such policy is granted: *St. John v. American Mut. Life Ins. Co.*, 13 N. Y. 31, 64 Am. Dec. 529.

A life insurance policy is, therefore, a mere chose in action, and, as such, was not assignable under the rules of the early common law. Various reasons are assigned for this doctrine. It is said to have been based upon the purely personal nature of the contract which forbade the insertion of a new party without the consent of both original parties; to have rested upon the ground that such assignment was violative of the law against maintenance and champerty; and still another reason is suggested to be that the vendor could not sell a mere expectation to recover at some future time. Whether any or all of these formed the basis for the rule at common law, they were early disregarded by the courts of equity, and such assignments were enforced by permitting the assignee to sue at law in the name of his assignor, and in equity in his own name.

By the modern law, choses in action are everywhere assignable, and although some states still retain the old rule to the extent of compelling suit in the name of the assignor, with certain exceptions to be hereafter considered, the general rule is well settled that a policy of life insurance may be transferred like any other chose in action: *Alabama Gold Life Ins. Co. v. Mobile Mut. Life Ins. Co.*, 81 Ala. 329, 1 South. 561; *In re Dobbel*, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87; *Morris v. Georgia Loan etc. Co.*, 109 Ga. 12, 34 S. E. 378; *United States Life Ins. Co. v. Ludwig*, 103 Ill. 305; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *Prudential Ins. Co. v. Young*, 14 Ind. App. 560, 56 Am. St. Rep. 319, 43 N. E. 253; *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116; *Union Central Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Embry v. Harris*, 21 Ky. Law Rep. 714, 52 S. W.

958; New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742; Hewlett v. Home for Incurables, 74 Md. 350, 24 Atl. 324; Palmer v. Merrill, 6 Cush. 282, 52 Am. Dec. 782; Ionia County Sav. Bank v. McLean, 84 Mich. 625, 48 N. W. 159; Hogue v. Minnesota Packing etc. Co., 59 Minn. 39, 60 N. W. 812; Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328; Chapman v. McIlwrath, 77 Mo. 38, 46 Am. Rep. 1; Falk v. Jones, 49 N. J. Eq. 484, 23 Atl. 813; St. John v. American Mut. Life Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; Olmstead v. Keyes, 85 N. Y. 593; Rousset v. Insurance Co. of North America, 1 Binn. 429; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496; Mutual Protection Ins. Co. v. Hamilton, 37 Tenn. 269; Seabey v. Waters, 78 Tenn. 551; Archibald v. Mutual Life Ins. Co., 38 Wis. 542; New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. Rep. 877; In re Turcan, L. R. 40 Ch. Div. 5.

b. Where Prohibited by the Policy.—The parties may, of course, by a provision to that effect in the policy, prohibit or limit its assignment, and any assignment contrary to such provision is void: Unity etc. Assn. v. Dugan, 118 Mass. 219. Where, however, in addition to a provision that the policy “should not be assignable in any case whatever,” there was inserted in the policy the clause that the company should not be bound to notice or to be affected by notice of any trust, equitable charge, or lien, it was held that this latter provision showed that the insurance office recognized the right of the insured to part with his interest, and that the effect of the provision against assignment was merely to make the policy not assignable at law. The insured might still assign his equitable interest: In re Turcan, L. R. 40 Ch. Div. 5. In the state of Iowa, by a peculiar statute, “when by the terms of an instrument its assignment is prohibited, the assignment of it shall nevertheless be valid, but the maker may avail himself of any defense or counterclaim against the assignee which he may have had against the assignor.” Under such a statute it is manifestly impossible to contract against the assignment of an instrument, and a life insurance policy may be assigned, although it be by its terms nonassignable: Crocker v. Hugin, 103 Iowa, 243, 72 N. W. 411.

A provision in a policy by which it is sought to restrict the assignment of the instrument is not applicable when once the loss has occurred or the policy has matured. The claim then becomes a debt, and is no longer subject to the restrictions of the policy: Briggs v. Earl, 139 Mass. 473, 1 N. E. 847; Mower v. Reverting Fund Assn., 1 Pa. Sup. Ct. 170.

c. Where but Part of the Proceeds of the Policy is Assigned.—The assignment of a part of the money due or to become due upon a life insurance policy is not infrequent. At common law the assignment of a part of a fund or debt was invalid unless assented to by the holder of the fund or the party owing the debt: Palmer v. Merril, 6 Cush. 282, 52 Am. Dec. 782. This doctrine, based as

it was upon the common-law rule against the splitting of a single cause of action, was not recognized by the courts of equity, and it is well established that equity will recognize and enforce the assignment of part of a fund: *Collins v. Dawley*, 4 Colo. 138, 34 Am. Rep. 72; *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398; *Briggs v. Earl*, 139 Mass. 473, 1 N. E. 847; *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072.

d. Where in Fraud of Creditors.

1. Generally.—A policy of life insurance may not, any more than any other property, be transferred in fraud of creditors, and it is well settled that an assignment of such a policy, with the intent to defraud the creditors of the assignor, is void as against the latter. In England, this question seems to have been variously decided, the early decisions holding that choses in action were included within the classes of property the fraudulent conveyance of which was prohibited by the statute of Elizabeth XIII: *Taylor v. Jones*, 2 Atkyns, 600. The later cases, however, held otherwise upon the ground that the statute applied only to such property as could be taken upon execution: *McCarthy v. Goold*, 1 Ball. & B. 387. But these cases have never been followed in this country: *Catchings v. Manlove*, 39 Miss. 655; *Burton v. Farinholt*, 86 N. C. 260; *Appeal of Elliott*, 50 Pa. St. 75, 88 Am. Dec. 525; and are now rendered nugatory even in England by an act of 1 & 2 Victoria, chapter 110, which renders all "securities for money" liable to seizure upon execution. Under this statute life insurance policies are subject to the claims of creditors: *Stokoe v. Cowan*, 29 Beav. 637, 7 Jur., N. S., 901; and both in England and in this country the rule is well established that the assignment of a policy of life insurance with intent to defraud one's creditors cannot affect the rights of the latter, and may be avoided by him: *Friedman v. Fennell*, 94 Ala. 570, 10 South. 649; *Barbour v. Connecticut Mut. Life Ins. Co.*, 61 Conn. 240, 23 Atl. 154; *Morehead v. Mayfield*, 22 Ky. Law Rep. 580, 58 S. W. 473; *Catchings v. Manlove*, 39 Miss. 655; *Chapman v. McIlwrath*, 77 Mo. 38, 46 Am. Rep. 1; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *McCord v. Noyes*, 3 Bradf. 139; *Burton v. Farinholt*, 86 N. C. 261; *Appeal of Elliott*, 50 Pa. St. 75, 88 Am. Dec. 525; *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41; see 29 Am. St. Rep. 195; *Freeman v. Pope*, L. R. 5 Ch. 538, L. R. 9 Eq. 206; *Taylor v. Colnen*, L. R. 1 Ch. Div. 636. Whether, or not an actual fraudulent intent in the assignor to defraud his creditors must be shown is a question upon which there is not a little conflict of authority. In some jurisdictions, it is held that nothing short of actual fraud will suffice to set such assignment aside: *Johnson v. Alexander*, 125 Ind. 575, 25 N. E. 706; *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116; and the mere fact that the assignor was insolvent at the time of the transfer is held not to be in itself sufficient proof of such fraud:

Appeal of McCutcheon, 99 Pa. St. 133. See, also, *Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854. Other courts, however, hold a conveyance by an insolvent without consideration to be constructively fraudulent, without reference to his actual intent: *Friedman v. Fennell*, 94 Ala. 570, 10 South. 649; *Catchings v. Manlove*, 39 Miss. 655; *Burton v. Farinholt*, 86 N. C. 261; *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41; *Freeman v. Pope*, L. R. 5 Ch. 538.

2. **Where Assignee is Wife or Child of the Assignor.**—In many states statutes exist by which the proceeds of policies upon the life of the husband are secured to the wife upon the husband's death, free from the claims of creditors. Even in the absence of such statute, however, the courts have recognized the doctrine that a husband, whether insolvent or not, may take out insurance upon his life for the benefit of his wife and children, the proceeds of which insurance shall go to the latter, free from the claims of creditors: See monographic notes to *Hise v. Hartford Life Ins. Co.*, 29 Am. St. Rep. 360, and to *Appeal of Elliott*, 88 Am. Dec. 530. In some states, the statutes extend this immunity from creditors to the proceeds of a policy taken out in the name of a husband and assigned to his wife, as well as to a policy originally payable to the wife: See *Morehead v. Mayfield*, 58 S. W. 473, 22 Ky. Law Rep. 580. In other jurisdictions, however, the courts make a distinction between these two cases, and while permitting insurance to be taken out by the husband in the name of the wife, do not, as against his creditors, permit a voluntary assignment by a husband to his wife of a policy taken out in the name of the former. Thus it is said in *Burton v. Farinholt*, 86 N. C. 260: "True, the constitution of the state (article 10, section 7) provides that a husband may insure his life for the sole use of his wife and children, and that in case of his death the amount insured shall be paid to them free from the claims of his creditors, and counsel here insist that the assignment of the policy, already procured, to his daughters was the same in effect as if the intestate had taken out a new one professedly for their benefit. But is it so? If taken directly in their names and for their benefit, it would have been ab initio their property, and would never have constituted a part of their father's estate, upon the faith of which he could, and perhaps did, obtain credit, and that is the test. If his creditors, when trusting him, relied or had a right to rely upon his life assurance as a source of payment, then the law will not permit them to be disappointed by a free gift of it to another." And this distinction is recognized in a number of cases holding such assignment void as against creditors: *Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159; *Burton v. Farinholt*, 86 N. C. 260; *Appeal of Elliott*, 50 Pa. St. 75, 88 Am. Dec. 525; *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41. The amount recoverable by the creditors in such case seems, however, to be limited to the

premiums paid by the husband in keeping such policy alive: *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83; *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116; *Chapman v. McIlwrath*, 77 Mo. 38, 46 Am. Rep. 1. See, however, *Fearn v. Ward*, 80 Ala. 555, 2 South. 114.

e. *Where Procured by Fraud, Duress, etc.*—Where the assignment of a policy of life insurance is procured by fraud or duress, it may be set aside by a court of equity. As between parties occupying no relation of confidence in or toward each other, undue influence or duress cannot be presumed in the absence of clear proof, but when once such elements are shown to have induced the assignment, it will be avoided in equity: *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395. A far more common case, however, is that in which the parties do occupy some confidential relation, as, for instance, that of husband and wife. In cases of this class one party is usually so situated as to exercise a controlling influence over the will or conduct of the other, and an assignment made under such conditions will be carefully scrutinized by the courts and set aside upon much slighter evidence of the improper employment of such influence than in those cases in which this element of confidence is not present: See *McKildin v. McKildin*, 20 Ky. Law Rep. 588, 47 S. W. 246; *Whitridge v. Barry*, 42 Md. 140; *Barry v. Equitable Life etc. Soc.*, 59 N. Y. 587; *Fowler v. Butterly*, 53 How. Pr. 471.

II. Formal Requisites of.

a. *May be Oral.*—The formal requisites to the transfer of a policy of life insurance are the same as those necessary to the conveyance of any other chose in action. In the absence of some provision in the policy of insurance, or in the general law requiring a written transfer, there need be none, and a parol assignment passes title quite as effectually as would the most formal instrument: *State v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. Rep. 335, 45 N. E. 1116; *Bushnell v. Bushnell*, 92 Ind. 503, 602; *Embry v. Harris*, 21 Ky. Law Rep. 714, 52 S. W. 958; *Morehead v. Mayfield*, 58 S. W. 473, 22 Ky. Law Rep. 580; *Harrison v. McConkey*, 1 Md. Ch. 34; *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 43 Atl. 33; *Hewlett v. Home for Incurables*, 74 Md. 350, 24 Atl. 324; *Hogue v. Minnesota Packing etc. Co.*, 59 Minn. 39, 60 N. W. 812; *Chapman v. McIlwrath*, 77 Mo. 38, 46 Am. Rep. 1; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *Falk v. Janes*, 49 N. J. Eq. 484, 23 Atl. 813; *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625; *Travelers' Ins. Co. v. Healey*, 44 N. Y. Supp. 1043, 19 Misc. Rep. 584; *Honi v. Germania Life Ins. Co.*, 197 Pa. St. 276, 80 Am. St. Rep. 819, 47 Atl. 200; *In re Hallstead's Estate*, 2 Kulp (Pa.), 508; *Barron v. Williams*, 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561; *McCauley v. Central Nat. Bank*, 27 S. C. 215, 3 S. E. 193; *Hancock v. Fidelity Mut. Life Ins.*

Co. (Tenn.), 53 S. W. 181; *Mangham v. Ridley*, 8 L. T. 309. See, however, *Hawes v. Prudential Life Assur. Co.*, 49 L. T. 133. Where the policy requires written assignment, see post, p. 497.

b. Consideration.—Where the assignment of a policy of life insurance was not intended as a gift, it must, like any other contract, be supported by a good consideration: *Price v. First Nat. Bank*, 62 Kan. 743, 64 Pac. 639; *Emerick v. Coakley*, 35 Md. 188; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768; *Wheeland v. Atwood*, 192 Pa. St. 237, 73 Am. St. Rep. 803, 43 Atl. 946. A promise, therefore, to forbear from issuing execution on a judgment which had no legal existence, and on which no execution could legally be issued, will not support the assignment of a policy of life insurance: *Price v. First Nat. Bank*, 62 Kan. 743, 64 Pac. 639; although an agreement to forbear bringing suit is generally a good consideration for such transfer: *Emerick v. Coakley*, 35 Md. 188.

c. Assent of Assignee.—The assignment being a contract between the assignor and assignee, the assent of both thereto is of course essential. In the case of the assignee, however, it is presumed that such assent is given where the assignment is beneficial to him, and the assignor has given him notice thereof: *Chamberlain v. Williams*, 62 Ill. App. 423. See, also, in this connection, *Lambert v. Pennsylvania Mut. Life Ins. Co.*, 50 La. Ann. 1027, 24 South. 16.

d. Delivery.

1. Necessity of.—Upon the question of whether or not a delivery of the policy is essential to a valid assignment of it, there is considerable confusion among the authorities. Many authorities seem to lay down the proposition that any assignment of a chose in action, whether supported by a valid consideration or intended to operate as a gift, is of no effect unless accompanied by a delivery of the instrument evidencing such chose in action. Thus, in *Palmer v. Merrill*, 6 Cush. 282, 52 Am. Dec. 782, *Shaw, C. J.*, uses the following language: "In order to constitute a valid assignment, two things must concur: 1. The party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; and 2. The transfer shall be of the whole and entire debt or obligation, in which the chose in action consists, and as far as practicable place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable." In the larger number of cases, however, the necessity of a delivery is dwelt upon with special reference to an assignment by way of gift rather than to a transfer for a valuable consideration. "A gift," says the court in *Spooner v.*

Hilbish, 92 Va. 333, 23 S. E. 751, "is a contract without consideration, and, to be valid, must be executed. A valid gift is, therefore, a contract executed. It is to be executed by the actual delivery by the donor to the donee or to some one for him, of the thing given, or by the delivery of the means of obtaining the subject of the gift, without further act of the donor, to enable the donee to reduce it to his own possession. . . . Delivery of possession of the thing given, or the means of obtaining it so as to make the disposal of it irrevocable, is indispensable to a valid gift": And see *In re Webb's Estate*, 49 Cal. 542; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854; *Appeal of Madeira (Pa.)*, 4 Atl. 908; *Scott v. Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192; *Bond v. Bunting*, 78 Pa. St. 210; *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751; *Alvord v. Luckenbach*, 106 Wis. 537, 82 N. W. 535.

2. **What Sufficient.**—The delivery referred to in these cases was evidently intended to mean a manual delivery of the policy of insurance. It seems, however, to be the modern tendency to require no actual delivery of the document, and whether the cases upholding this view are to be regarded as establishing a rule opposed to that of the cases cited or merely as qualifying or defining the "delivery" required by them, the force of the authorities requiring a "delivery of possession" is greatly lessened by these later cases. "There can be no doubt," says Justice Holmes, in *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072, "that the insistence on the necessity of the delivery of the document of title in *Palmer v. Merrill*, 6 Cush. 282, 52 Am. Dec. 782, is a mistake so far as equity is concerned, if the assignment has been communicated to the assignee, and assented to by him." In *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338, the court says: "No controversy is made upon the proposition that an actual manual delivery was not necessary, but it is admitted by counsel that a good delivery may be made by acts without words, by words without acts, or by both. . . . The usual mode of delivery is the mutual transfer from the grantor to the grantee. But it is too well understood to call for the citation of authorities that the declarations and conduct of the grantor in relation to the instrument may be such as to become equivalent to such actual delivery, and in every such case the crucial test is the intent with which the acts or declarations were made, and that intent is to be ascertained from the conduct of the parties, particularly the grantor and all the surrounding circumstances of the transaction": See, also, *Otis v. Beckwith*, 49 Ill. 121; *Chamberlain v. Williams*, 62 Ill. App. 423; *Janes v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, 26 Atl. 138.

Even under the doctrine of these cases, however, there must be something either in the words or conduct of the grantor to show plainly his intention that the policy pass from his dominion and

control. Manual delivery is not necessary, but, upon the other hand, there is necessary a parting with all present and future dominion over the property given. There can be no gift or other assignment so long as it remains within the power of the donor or grantor to recall the subject of the gift or assignment. This does not necessarily mean that the grantor must part with its possession. He may retain possession of the policy even after the power to control its disposition has passed from him. But "no case can be found, nor can we conceive that it could be held that a deed retained by the grantor for the grantee would ever be equivalent to a delivery, unless it was clearly shown that he retained it under such circumstances as would estop him from making any other disposition of it subsequently": *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338; *Williams v. Chamberlain*, 165 Ill. 210, 46 N. E. 250.

What amounts to a delivery is therefore a question to be determined only by a consideration of the facts of each case. An actual manual delivery of the policy itself is the best and most satisfactory method of delivery possible, and is, of course, sufficient: *Crittenden v. Phoenix Mut. Life Ins. Co.*, 41 Mich. 442, 2 N. W. 657; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060. Much less than this, however, will suffice. There may be an assignment by the delivery of another paper addressed to either the insurance company or the assignor's personal representatives, asking it or them to pay the assignee the sum named in the policy: *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Grogan v. United States etc. Ins. Co.*, 90 Hun, 521, 36 N. Y. Supp. 687. Nor need this other instrument have the technical form of an assignment. It is sufficient if it give to the assignee the right as against the company to collect the money and to give the latter a valid discharge: *Grogan v. Insurance Co.*, 90 Hun, 521, 36 N. Y. Supp. 687.

Delivery need not be to the assignee in person, but may be made to a third person as agent for the assignee: *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294; *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625. And in this connection there has arisen a class of cases with reference to which upon very similar states of facts the courts have reached very different conclusions. A very common provision in policies of life insurance is that requiring a duplicate copy of any assignment of the policy to be sent to the office of the company, and a compliance with this provision is frequently argued to amount to a delivery of the assignment to the company as an agent for the assignee. The weight of authority seems to be opposed to giving it any such effect. In *Scott v. Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192, the court says: "The delivery of the assignment to the company was not the equivalent of a delivery to Scott. The whole thing was in fieri; there was no consideration; and the assignment, being the voluntary act of the assured, was subject to

the power of revocation. That circumstances might have arisen which would have made the revocation a matter of some trouble and expense is not to the purpose. The true test was the right to revoke or cancel the assignment. If that existed, nothing passed to the assignee at the time of the assignment." The delivery of the assignment to the company is, it would seem, rightly regarded, not as a delivery to a third person for the benefit of the assignee, but as a fulfillment of a condition required by the company for its own protection in the event of an actual assignment being made: *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338; *Spooner v. Hilbish*, 92 Va. 333, 23 S. E. 751. In *Hurlburt v. Hurlburt*, 49 Hun, 189, 1 N. Y. Supp. 854, on the other hand, a delivery of an assignment to the insurance company was held a sufficient delivery for the benefit of the assignee. While this case may perhaps be distinguished upon the ground mentioned in *Weaver v. Weaver*, 182 Ill. 287, 74 Am. St. Rep. 173, 55 N. E. 338, that it does not appear that there was there a condition in the policy that the company should be furnished with a copy of any assignment to make it valid, no such distinction can possibly be made in the case of *Burges v. New York Life Ins. Co. (Tex.)*, 53 S. W. 602. In that case the policy contained a clause to the effect that "any assignment of this policy must be made in duplicate, and both copies must be sent to the home office, one of them to be retained by the company," and a compliance with this provision was held sufficient evidence of an intention in the assignor to consummate the transaction by a delivery and in the manner provided by the policy. On principle, however, this is quite doubtful, and the doctrine laid down in the cases above referred to, and holding such delivery insufficient would seem to be preferable.

Where the trustee is notified and consents to the trust, and the assignment to him is noted upon the books of the insurance company, the gift was held complete: *Otis v. Beckwith*, 49 Ill. 121. Upon the other hand, where the owner of a policy retained it in his own safe, with a note that on his death the policy and assignment should be delivered to a certain party as trustee for the grantor's children, but never notified the trustee, the assignment was held invalid for want of a delivery: *Appeal of Taylor*, 75 Pa. St. 115. See, however, *Janes v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, 26 Atl. 138. And see, generally, as to what amounts to a delivery sufficient to consummate the assignment of a life insurance policy, in *re Webb*, 49 Cal. 541; *St. Clair etc. Soc. v. Fletsam*, 97 Ill. 474; *Williams v. Chamberlain*, 165 Ill. 210, 46 N. E. 250; *Richardson v. White*, 167 Mass. 58, 44 N. E. 1072; *Bartlett v. Goodrich*, 91 Hun, 642, 36 N. Y. Supp. 770; *Phipard v. Phipard*, 55 Hun, 433, 8 N. Y. Supp. 728; *Appeal of Madeira (Pa., Feb. 1886)*, 4 Atl. 908; *Kulp v. March*, 181 Pa. St. 627, 59 Am. St. Rep. 687, 37 Atl. 913; *Sewell v. King*, L. R. 14 Ch. Div. 179.

e. Notice to, and Assent of, Insurer.

1. Necessity of.—In the absence of some clause in the policy requiring that notice of an assignment be given to the company, and assent to the assignment be obtained from it, it is well established that no such notice and assent are necessary. In this policies of life insurance differ from those of fire and marine insurance, and the reason for the difference is well stated in *New York Life Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742, as follows: "In fire policies there is generally a condition that any assignment will be void without the assent of the underwriters be first obtained. The reason of this is obvious. A fire policy may be underwritten for one person when it would not be for another. In all such cases, the character for integrity and caution of the party constitute important considerations. While the character of one person would be a complete guaranty that he would not fire his own house or goods, the character of the assignee might furnish no such assurance, and therefore it is that in fire policies the assent of the underwriters is indispensable to the validity of the assignment. No such reason obtains in the case of an insurance on human life": See, to the same effect, *Robinson v. Cator*, 78 Md. 72, 26 Atl. 959; *Klinckhamer Brewing Co. v. Cassman*, 21 Ohio C. C. 465, 12 Ohio C. C. D. 141; *Mutual Protection Ins. Co. v. Hamilton*, 37 Tenn. 269; *Cook v. Black*, 1 Hare, 390; contra, *Hubbard v. Stapp*, 32 Ill. App. 541.

2. Effect of as Between Prior and Subsequent Assignees.—In this connection it has been held in New York and Tennessee that, as between different assignees of a life insurance policy from the same person, the one prior in point of time will be protected, although no notice has been given to the insurance company: *Columbia Bank v. Equitable Life Assur. Soc.*, 61 App. Div. 594, 70 N. Y. Supp. 767; *Mutual etc. Ins. Co. v. Hamilton*, 37 Tenn. 269. In England, however, the rule seems to be otherwise, and it is there held that the subsequent assignee will take in spite of a prior assignment where no notice has been given the company of such prior assignment: *Ex parte Caldwell*, L. R. 13 Eq. 188; *Edwards v. Martin*, L. R. 1 Eq. 121. See, also, *Newman v. Newman*, L. R. 28 Ch. Div. 674. In Louisiana, under a statute providing that the transferee of a debt or other incorporeal right is only possessed, as regards third persons, after notice has been given the debtor of the transfer having taken place, it was held in *Succession of Risley*, 11 Rob. (La.) 298, that the subsequent assignee might take without reference of the prior assignment, until notice thereof was given the company in accordance with the statute.

3. Effect of—Generally.—From the rule that the assent of the company is not essential to an assignment of a life insurance policy, it does not follow that such assent is altogether a vain act, even when not required by the policy. Without the assent of the company the assignee would, at common law, be compelled to sue in

the name of his assignor. With such consent the assignee may bring suit in his own name against the insurer: *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Brown v. Mansur*, 64 N. H. 39, 5 Atl. 768.

4. **Where Required by Terms of Policy.**—The parties may, however, and at the present time do in most cases, provide that the assignment shall be valid only when assented to by the insurer. When this is done an assignment made without such assent is of no effect as against the insurance company: *Molise v. Louisiana Mut. etc. Assn.*, 45 La. Ann. 736, 13 South. 170. See, however, *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625.

Provisions such as these are, however, construed as being inserted for the protection of the insurance company, and it is held by the great weight of authority that the insurer alone can take advantage of a failure to procure the assent of the company as provided by the policy. As between assignor and assignee, it is immaterial whether or not such assent has been given: *Mutual Protection Ins. Co. v. Hamilton*, 37 Tenn. 269; *Fuller v. Kent*, 13 App. Div. 529, 43 N. Y. Supp. 649. In *Stevens v. Warren*, 101 Mass. 564, this distinction seems to have been overlooked, and an assignment without the consent of the company was there held void as between the assignee and the heirs of the assignor, because the consent of the insurer to the assignment was not procured in accordance with the clause of the policy. Where no particular time for giving such notice was specified in the policy, it was held that notice given two days after the assignment, although after the death of the assured, was sufficiently early, since knowledge of the assignment could be important to the insurer only to prevent it being compelled to pay both the assignee and the legal representatives of the insured: *New York Life Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742. In *Mutual Protection Life Ins. Co. v. Hamilton*, 37 Tenn. 269, on a petition for rehearing, the court—speaking with reference to a clause in the policy, as follows: "If assigned, notice to be given the company"—uses this language: "In the case before us, where the question is merely between the assignee and the office, the words referred to can have no influence on the decision of the case. The requirement that the company should have notice of the assignment could have no other object, except the protection of the company. The only reason for such notice would be to secure the company against the hazard of loss, from paying the money to the personal representative of the assured and being compelled to pay a second time to the assignee. . . . And as the company sustained no possible injury for want of such notice, the omission cannot be set up as a defense against the right of the assignee to recover the money." It would seem, however, on principle that it should make no difference whether the company actually suffered injury through want of notice or not. The parties having contracted that notice was to be

given, as between the insurer and the assignee, a failure to comply with this provision should defeat the action of the latter.

In *Travelers' Ins. Co. v. Healey*, 44 N. Y. Supp. 1043, 19 Misc. Rep. 584, it was held that a clause in the policy which prohibited its transfer without the written assent of the insurers did not apply to a deposit by way of pledge. "The reason is that a pledge is not a transfer of title nor an assignment of the policy. The legal title remains in the pledgor. The pledgee has the possession and a special property which he holds to protect his equitable lien."

f. Where Policy Prescribes Mode of Transfer.—Very similar to the clauses in policies requiring notice to and assent by the insurer to render valid an assignment are those provisions which prescribe a certain mode of assignment as essential to the validity of any transfer of the policy. The most frequent are those prescribing that the assignment shall be in writing, and, in some cases, that it be indorsed upon the policy. Such provisions are invariably construed as being inserted for the protection of the insurer, compliance with which may be waived by the company, and it is held that as between the assignor and assignee it is no defense that the mode of assignment prescribed has not been followed. "This provision is not one which is intended to guard against increased risks, and does not go to or infuse itself into the essence of the contract. Its sole purpose is to protect the company against the danger of having to pay the policy twice, by requiring written evidence of any change of beneficiaries to be put into reliable form, and promptly furnished to the company. All that could, at the very most, be claimed as the effect of a noncompliance with this stipulation is that the company might disregard the attempted assignment and pay the money to the original beneficiary; in other words, such attempted assignment would be voidable at the option of the company. The provision being exclusively for the protection of the company, it might waive its requirements if it saw fit. The assignment in this case from the husband to the wife would be perfectly good as between the parties; and if, in case of his death, the insurance company saw fit to pay the money to the wife, those claiming under the husband would not be heard to object because the assignment was not indorsed on the policy, or given to the company": *Hogue v. Minnesota Packing etc. Co.*, 59 Minn. 39, 60 N. W. 812. And see to the same effect, *Embry v. Harris*, 21 Ky. Law Rep. 714, 52 S. W. 958; *Lee v. Murrell*, 9 Ky. Law Rep. 104; *Howlett v. Home for Incurables*, 74 Md. 350, 24 Atl. 324; *Hewins v. Baker*, 161 Mass. 320, 37 N. E. 441; *Burges v. New York Life Ins. Co. (Tex.)*, 53 S. W. 602.

III. Who may Assign.

a. The Beneficiary.

1. Generally—Vested Right to Policy.—The question, Who may assign a policy of life insurance? can be answered only by a deter-

mination of the rights of the insured and the beneficiary, respectively, in such policy, and with reference to this there is a slight conflict of authority. By the great weight of authority, however, where a policy is taken by a person either upon his own life or that of another, and is made payable to a third person, the latter takes a vested interest in both the policy and the money to become due under it. From the moment the policy is issued the entire beneficial interest in it and in its proceeds is vested in the beneficiary named therein, an irrevocable trust is created, and the beneficiary takes an absolute title indefeasible by any assignment by the insurer: *Block v. Valley Mut. Ins. Assn.*, 52 Ark. 201, 20 Am. St. Rep. 166, 12 S. W. 477; *In re Dobbel*, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87; *Yore v. Booth*, 110 Cal. 238, 52 Am. St. Rep. 81, 42 Pac. 808; *Chapin v. Fellowes*, 36 Conn. 132, 4 Am. Rep. 49; *Glanz v. Gloecker*, 104 Ill. 573, 44 Am. Rep. 94; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *Nye v. Grand Lodge etc.*, 9 Ind. App. 131, 36 N. E. 429; *Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Carpenter v. Knapp*, 101 Iowa, 712, 70 N. W. 764; *Olmstead v. Masonic Soc.*, 37 Kan. 93, 14 Pac. 449; *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937; *Pilcher v. New York Life Ins. Co.*, 33 La. Ann. 322; *Anthony v. Massachusetts etc. Assn.*, 158 Mass. 322, 33 N. E. 577; *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771; *Jackson Bank v. Williams*, 77 Miss. 398, 78 Am. St. Rep. 530, 26 South. 965; *City Sav. Bank v. Whittle*, 63 N. H. 587, 3 Atl. 645; *Travelers' Ins. Co. v. Healey*, 86 Hun. 524, 33 N. Y. Supp. 911; *Macaulay v. Central Nat. Bank*, 27 S. C. 215, 3 S. E. 193; *Seabey v. Waters*, 78 Tenn. 551; *Irwin v. Travelers' Ins. Co. (Tex.)*, 39 S. W. 1097; *Atkins v. Atkins*, 70 Vt. 565, 41 Atl. 503; *Hume v. Central Bank*, 128 U. S. 195, 9 Sup. Ct. Rep. 41; *Brockhaus v. Kenna*, 7 Fed. 609; *Weston v. Richardson*, 48 L. T., N. S., 514. According to the cases adopting this view, it is immaterial whether the insured or the beneficiary pays the premium, and it matters not that the party who procured the insurance remains in possession of the policy: *In re Dobbel*, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. 87; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *In re Richardson*, 47 L. T., N. S., 514.

Such is undoubtedly the rule established by the great weight of authority, but the courts are by no means unanimous in its support. In *Conyne Stone etc. Co. v. Jones*, 51 Ill. App. 17, the courts, after reviewing the various decisions affecting the question in Illinois, presents the following potent argument in favor of treating such policy as "a mere declaration of a purpose to bestow a bounty which, until death, vests no rights of property in the legatee or beneficiary"; "Where the assured makes the contract and pays the premiums or assessments, it exists as a contract between him and the insurer alone. If the assured failed or refused to pay the premium or assessment, the beneficiary could not compel the as-

sured, by a proceeding in law or equity, to continue the payment on the ground of an original promise as evidenced by the certificate or policy. Such beneficiary would have no legal ground of complaint of a failure to make such payment, or of the insured's surrender of the certificate or policy for cancellation; *Martin v. Stubbings*, 126 Ill. 407, 9 Am. St. Rep. 620, 18 N. E. 657. Such beneficiary could not require the company or association to receive such payment from him to prevent a forfeiture, for the reason that there was no contract for payment by such beneficiary. Neither could he pay in the name of the insured and thereby make himself voluntarily the creditor of the insurer. How can the right of property in such a policy be said to vest in the beneficiary immediately upon its issue, when the law affords such beneficiary no remedy for its protection from destruction? To destroy a vested right of property in another willfully is to commit a wrong. It is the boast of the common law that there is no wrong without a remedy, and yet the insured in such a policy can surrender it for cancellation without the consent of the beneficiary, or refuse to continue payments, which will work a forfeiture, although thousands of dollars in premiums have been paid. This is not consistent with the legal idea of a vested right. It comports more nearly with the legal idea of a proposed or unexecuted gift, in which case there is a right of revocation at pleasure." And after showing that the insured should have right, the court concludes: "Our conclusion, therefore, is based upon the law and considerations of public policy, that when the contract is made, and consideration paid by the insured for the benefit of another, the beneficiary may be changed by the agreement of the contracting parties." And this is the rule followed by the courts of Wisconsin; *Clark v. Durand*, 12 Wis. 223; *Foster v. Gille*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; *Strike v. Wisconsin etc. Life Ins. Co.*, 95 Wis. 583, 70 N. W. 819. See, also, *Garner v. Germania Life Ins. Co.*, 32 Alb. L. J. 91. In *Metropolitan Life Ins. Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012, this view is taken, but the case cited as authority therefor (*Union Mut. Assn. v. Montgomery*, 70 Mich. 594, 14 Am. St. Rep. 519, 38 N. W. 588), is one involving the rights of beneficiaries in certificates of mutual benefit societies, with reference to which a different rule prevails (see post, p. 516); and the law of Michigan is undoubtedly that the beneficiary does take a vested interest: *Lockwood v. Michigan Life Ins. Co.*, 108 Mich. 334, 66 N. W. 229.

Whether the rule that the beneficiary takes title to the policy and its proceeds immediately upon its issue be based upon correct reasoning or not, and whether or not it was originally laid down in cases governed by special statutes or contracts by the beneficiary (see *Conyne Stone etc. Co. v. Jones*, 51 Ill. App. 17), it is the rule supported by the great weight of authority, and from which flow important consequences with reference to the assignment of life insurance policies. From it necessarily follows the rule that the

beneficiary alone can control the policy, and that no assignment by the insured without the consent of the beneficiary can in the least affect the rights of the latter. Whether the naming of the beneficiary in the policy be regarded as an executed gift or as an irrevocable trust, the title, legal and equitable, to the policy, and to its proceeds is in the beneficiary, and can only be transferred by his act or with his consent: *Drake v. Stone*, 58 Ala. 133; *Block v. Valley Mut. Ins. Assn.*, 52 Ark. 201, 20 Am. St. Rep. 166, 12 S. W. 447; *Yore v. Booth*, 110 Cal. 238, 52 Am. St. Rep. 81, 42 Pac. 808; *Hubbard v. Stapp*, 32 Ill. App. 541; *Prudential Ins. Co. v. Young*, 14 Ind. App. 560, 56 Am. St. Rep. 319, 43 N. E. 253; *Pence v. Makepeace*, 65 Ind. 345; *Carpenter v. Knapp*, 101 Iowa, 712, 70 N. W. 764; *Pilcher v. New York Life Ins. Co.*, 33 La. Ann. 322; *Gould v. Emerson*, 99 Mass. 154, 96 Am. Dec. 720; *Boyden v. Mass. etc. Ins. Co.*, 153 Mass. 544, 27 N. E. 690; *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771; *Allis v. Ware*, 28 Minn. 166, 9 N. W. 666; *Jackson Bank v. Williams*, 77 Miss. 398, 78 Am. St. Rep. 530, 26 South. 965; *Stokell v. Kimball*, 59 N. H. 13; *City Sav. Bank v. Whittle*, 63 N. H. 587, 3 Atl. 645; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208, 33 Atl. 1060; *Ferdon v. Canfield*, 104 N. Y. 143, 10 N. E. 146; *Lockwood v. Bishop*, 51 How. Pr. 221; *Hardick v. Reeves*, 2 Pa. Super. Ct. 545; *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774; *Scobey v. Waters*, 78 Tenn. 551; *Irwin v. Travelers' Ins. Co. (Tex.)*, 39 S. W. 1097; *Central Bank of Washington v. Hume*, 128 U. S. 195, 9 Sup. Ct. Rep. 41; *Weston v. Richardson*, 47 L. T., N. S., 514.

2. **Where Policy is Payable to Second Beneficiary on Death of the First.**—Where the policy is made payable to one person, and in the event of his or her death before that of the party whose life is insured, it is provided that the proceeds are payable to a third person, the question as to who may assign is complicated by the presence of two beneficiaries. The most frequent case is that in which a policy upon the life of A is made payable to his wife, and, in the event of her death before that of A, to the children. In such case the wife has an interest which she may assign: *Travelers' Ins. Co. v. Healey*, 44 N. Y. Supp. 1043, 19 Misc. Rep. 584; but her assignee takes no greater rights than she herself had, and in the event of her death before that of her husband, the assignee has no rights in the policy as against the children. As was said by the supreme court of Pennsylvania in *Brown's Appeal*, 125 Pa. St. 303, 11 Am. St. Rep. 900, 17 Atl. 419: "If she survived her husband, the insurance money was payable to her, but if she did not it was payable to her children then living. Their right to the money depended upon the terms of the contract, which was payable to them if she was not living at the death of the insured. They were parties to the contract as surely as she was, and with as clear a right to sue upon it, upon the happening of the contingency that made them the payees, as she could have

had if living. Her assignment put her assignee in no better position than she occupied, and conferred upon him no greater interest in the policy. Her death in the lifetime of her husband extinguished her interest in the policy, and it can no more survive in the hands of her assignee than in her administrator. The condition on which her right to recover was to end and that of her children was to arise has happened, and the contract of the insurance company is now with the children, and must be enforced by them for their benefit": See, also, *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157; *Anderson v. Goldsmith*, 103 N. Y. 617, 9 N. E. 495; *Travelers' Ins. Co. v. Healey*, 86 Hun, 524, 33 N. Y. Supp. 911; *Newcomb v. Mutual Life Ins. Co.*, Fed. Cas. No. 10,147.

In *Barry v. Equitable Life Assur. Soc.*, 14 Abb. Pr., N. S., 385, note, it is held, with reference to a policy payable to the wife of the insured and, in case she predeceased him, to her children, that the wife's right was a mere contingent interest, which "did not arise to the dignity of an estate," and consequently formed no part of the "separate property" which a married woman was permitted to convey by the married woman's acts. This, however, is more than doubtful, and it is submitted that her interest, although liable to be defeated if she died before her husband, was "separate property," and property which she might convey under the law of New York: *Anderson v. Goldsmith*, 103 N. Y. 617, 9 N. E. 495.

3. Endowment Policies.—By reason of the growing frequency with which endowment insurance is now employed, it becomes important to determine in whom the right of assigning a policy of this nature resides. Here, as in the class of cases just considered, two beneficiaries are named in the policy. "Endowment insurance provides for the payment of the sum insured to the person insured if he live to a certain time or if he die before that time, to some other person nominated in the policy": *Union Central Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205. With reference to such insurance, it is uniformly held that each beneficiary has an interest in the policy, assignable by him, but that neither can assign the interest of the other or defeat it in any way. The rights of both are conditional, it is true, and the vesting of the interest of each depends upon a contingency which may never happen. Nevertheless, each has an undoubted interest in the policy, however qualified that interest may be, and cannot be divested of it without his or her consent. Each has an assignable interest in the policy independent of the other, and any encumbrance or conveyance made by either with reference to his interest will be valid and binding upon him in the event of such interest becoming absolute by the happening of the contingency upon which its vesting is made to depend: *Union Cent. Life Ins. Co. v.*

Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; Lambert v. Pennsylvania Mut. Life Ins. Co., 50 La. Ann. 1027, 24 South. 16; Pierce v. Charter Oak Life Ins. Co., 138 Mass. 151; Kendall v. Equitable Life Assur. Soc., 171 Mass. 568, 51 N. E. 464. See also Entwistle v. Travelers' Ins. Co., 17 Pa. Super. Ct. 180.

b. The Assured.

1. **Where Right to Change Beneficiary is Reserved by Terms of the Policy.**—In the absence of some provision in the policy, whereby the insured reserves the right to effect a change of beneficiaries, the beneficiary named in the policy takes, as we have seen, absolute title to it, and the assured cannot by any assignment of his affect this title. Where, however, the right to change the beneficiary is reserved by the terms of the policy to the insurer, the beneficiary takes subject to this provision, and his title to the policy may be defeated "by the terms of the very contract naming him as beneficiary. It is a condition of the contract, and his right is therefore subject to it": Hopkins v. Hopkins, 92 Ky. 327, 17 S. W. 864; Menk v. Townsend, 68 Ark. 391, 59 S. W. 41; Wirgman v. Miller, 98 Ky. 620, 33 S. W. 937. In Georgia, it is provided by statute that the assured may direct to whom the insurance money is to be paid, and that no other person can defeat such direction. Under this statute it is held that the beneficiary may not assign, and that the insured alone can change the policy in this respect: Smith v. Head, 75 Ga. 755.

2. **Where Policy is Payable to Assured or to His Personal Representatives.**—Where the policy is made payable to the assured, his executors and administrators, he may, of course, assign the policy. As is said in Prudential Ins. Co. v. Young, 14 Ind. App. 560, 56 Am. St. Rep. 319, 43 N. E. 253: "The policies sued on did not designate a beneficiary in whom the right to benefits under the policy vested. The insured had neither an executor nor an administrator, and could not have until after his death. . . . It is plain that the beneficiary designated was the insured's estate, and was the property of his estate, and if he had died without changing the beneficiary, it could have been collected as part of the assets of the estate, and used to pay his debts. In fact, the policies were made payable to the insured himself, and the rights thereunder accrued to him, and, as his property, he had a right to sell, assign, or transfer them the same as any other chose in action, subject, however, to the restrictions which the law places around the transfers of policies of insurance on the lives of persons": See, to the same effect, Harley v. Heist, 86 Ind. 196, 44 Am. Rep. 285; Robinson v. Hurst, 78 Md. 59, 44 Am. St. Rep. 266, 26 Atl. 956; New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742; St. John v. American etc. Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. Rep. 877.

3. Where Policy is Payable to "Heirs" of the Assured.—Where however, the beneficiaries designated are the "heirs" of the insured, it is held that the general rule applies, and the insured may not defeat the vested rights of the persons answering this description. In *Yore v. Booth*, 110 Cal. 238, 52 Am. St. Rep. 81, 42 Pac. 808, it was contended that the general rule was not applicable in such case, because a living person has no heirs, and no interest could, therefore, vest in any persons during the lifetime of the insured. In answer to this contention the court, speaking through Beatty, C. J., says: "This would seem to be a very technical ground for making a distinction in the application of a doctrine which, if it is a sound and wholesome one, ought to protect these plaintiffs, and others in like situation, as completely as if they had been named. It appears that when Peter Yore applied for his insurance he had a wife and a number of children living. If he had designated them by name, or the survivors of them, as his beneficiaries, and had added a proviso that any after-born child should come in for an equal share, we can see no reason why such designation would not have been effectual, and this, in legal effect, is what he did. If, in the case supposed, an interest in the policy would have vested in the named beneficiaries, as we think it would, the same interest vested in these plaintiffs on the issuance of the policy, and it was not in the power of Peter Yore thereafter to change the beneficiaries or revoke his benefaction": See, also, *Weisert v. Muehl*, 81 Ky. 336; *Gosling v. Caldwell*, 1 Lea, 454, 27 Am. Rep. 774.

c. Right of Married Woman to Assign or Pledge Policy as Security for Debt of Husband.—In the absence of some statute prohibiting it, a married woman may undoubtedly assign or pledge an insurance policy owned by her as collateral security for a debt of her husband: *Collins v. Dawley*, 4 Colo. 138, 34 Am. Rep. 72; *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398; *De Ronge v. Elliott*, 23 N. J. Eq. 486. In many of the states, however, statutes are found which by various provisions seek to invalidate any disposal of the property of a married woman to pay the debts of her husband, and prohibit her becoming surety or guarantor upon any obligation of his. Under such statutes, any assignment or pledge of an insurance policy by a wife as security for a debt of her husband is void: *Smith v. Head*, 75 Ga. 755; *Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Stokell v. Kimball*, 59 N. H. 13. In Pennsylvania, however, under a statute very similar to those involved in the cases cited by the provisions of which statute a married woman cannot become accommodation indorser, security, or guarantor for another, it is held that an assignment of a life insurance policy by a married woman as security for the debt of her husband is valid. In reaching this conclusion, the courts construe the statute as applying only to a technical contract of indorsement, suretyship, or guaranty, and as

having no reference to a transfer of property as security for the debt of another: *Kulp v. Brant*, 162 Pa. St. 222, 29 Atl. 729; *Dusenberry v. Mutual Life Ins. Co.*, 188 Pa. St. 454, 41 Atl. 736.

d. Right of Wife to Assign Policy on Husband's Life Under Act Exempting It from Claims of Creditors.

1. **Generally—New York Doctrine.**—In connection with the right of a married woman to assign a life insurance policy to which she holds title, there has arisen a numerous class of cases involving her right to so assign under statutes permitting her to take the proceeds of a policy of insurance on her husband's life, free from the claims of creditors. Neither the original statute of this nature (that of New York passed in 1840) nor most, if any, of the numerous acts to the same effect since passed in various states and in England, make any reference in terms to the right of the beneficiary to assign such policies. The courts have, however, by a process of construction given these enactments great force in determining the assignability of such policies, and this fact, together with the general extent to which such statutes are now found, justify their consideration in this connection.

By these statutes, of which that of New York, enacted in 1840, was the original and is the type, it is provided that a married woman may cause the life of her husband to be insured. "And in case of her surviving her husband the sum of insurance, becoming due and payable by the terms of the insurance, shall be payable to her to and for her own use, free from the claims of the representatives of her husband or of any of his creditors; but such exemption shall not apply where the amount of premium annually paid shall exceed three hundred dollars." In *Eadie v. Slimmon*, 28 N. Y. 9, 82 Am. Dec. 395, a policy so obtained by a married woman had been assigned by her, and the assignment was held void by the court of appeals, among the reasons assigned being one to the effect that a policy issued under the act of 1840 was nonassignable. On a motion for rehearing, this doctrine was reaffirmed in the frequently quoted language of Denio, C. J.: "The provision is special and peculiar, and looks to a provision for a state of widowhood and for orphan children; and it would be a violation of the spirit of the provision to hold that a wife, insured under this act, could sell or traffic with her policy, as though it were realized personal property, or an ordinary security for money." And this was the undoubted law of New York so long as the statute referred to was unaffected by subsequent enactments: *Frank v. Mutual Life Ins. Co.*, 102 N. Y. 266, 55 Am. Rep. 807, 6 N. E. 667; *Bacon v. Brummer*, 100 N. Y. 372, 3 N. E. 474; *Wilson v. Lawrence*, 76 N. Y. 585, affirming 13 Hun, 238; *De Jonge v. Goldsmith*, 46 N. Y. Super. Ct. 131; *Spencer v. Myers*, 150 N. Y. 269, 55 Am. St. Rep. 675, 44 N. E. 942; *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651; *Pratt v. Globe Mut. Life Ins. Co.*, 3 Tenn. Cas. 174, 17 S. W. 352. In

Brummer v. Cohn, 86 N. Y. 11, 40 Am. Rep. 503, it was doubted whether the act of 1840 as originally passed covered an endowment policy, but it was held that the subsequent amendment of the statute in 1866 by the substitution of the phrase, "in case of her surviving such period or term," in place of "in case of her surviving her husband," clearly included that form of insurance: *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651; *Living v. Domett*, 26 Hun, 150.

2. Under Acts Enabling Married Women to Assign Property.—So strictly did the courts of New York adhere to the doctrine that policies for the benefit of the wife and children were nonassignable that they refused to regard the general enabling acts in relation to married women and their separate property as having any applicability to policies so payable: *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493; *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587. In other states, however, a different view has prevailed, and general enabling acts giving married women the power to sell or assign their separate property have been held to give them this right with reference to insurance policies, even where statutes relating to the latter similar to that of New York were in force: *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; *Emerick v. Coakley*, 35 Md. 188. See, also, *Baker v. Young*, 47 Mo. 453. In *Frank v. Mutual Life Ins. Co.*, 102 N. Y. 266, 55 Am. Rep. 807, 6 N. E. 667, the New York doctrine is held to apply to all policies covered by the statute without reference to the question by whom the premiums are paid. In *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725, however, a distinction is sought to be made between cases where the premiums are paid by the wife and where paid by the husband, and in *Robinson v. Mutual Ben. Life Ins. Co.*, 16 Blatchf. 194, Fed. Cas. No. 11,961, the rule of the New York courts is said to have no applicability to an assignment by the wife to insure payments of premiums on the policy. In *Scobey v. Waters*, 78 Tenn. 551, the entire doctrine of nonassignability is dismissed as being opposed to the current of authority. This, however, is somewhat doubtful: See, also, *Ford v. Travelers' Ins. Co.*, 6 Mackey, 384; *Kerman v. Howard*, 23 Wis. 108; *Newcomb v. Mutual Life Ins. Co.*, Fed. Cas. No. 10,147. Whether the rule laid down in New York covers a policy taken out in the name of the husband, and by him assigned to the wife, is a question upon which there is a conflict of authority. The doctrine is held applicable to such policies in *Cole v. Marple*, 98 Ill. 58, 38 Am. Rep. 83, and *McCord v. Noyes*, 3 Bradf. 139, but the opposite is held in *Ionia County Sav. Bank v. McLean*, 84 Mich. 625, 48 N. W. 159, and in *Dannheuser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160, and the latter view is probably preferable. See, also, *Morschauer v. Pierce*, 72 N. Y. Supp. 328, 64 App. Div. 558.

As well established as is the doctrine of the nonassignability of "wife policies" in New York under the statute referred to, it is

equally well settled that the wife alone can question the validity of such assignment. As is said in *Smillie v. Quin*, 90 N. Y. 492: "She is sufficiently protected if she is permitted to assert the invalidity of the assignments. It will do her no good and do her family no good if creditors or strangers are permitted to come in and assert the invalidity of the assignments, for the purpose of sweeping away the amount of the insurance." And to the same effect are *Frank v. New York Mut. Life Ins. Co.*, 12 Daly, 267; *Travelers' Ins. Co. v. Healey*, 44 N. Y. Supp. 1043, 19 Misc. Rep. 584; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493.

3. Under Later New York Statutes.—In New York, at least, the rigor of this rule that such policies are nonassignable by the wife has been greatly softened by subsequent legislation. An excellent review of this legislation is to be found in the recent case of *Dannheuser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160, but it will be necessary here to mention only two of these enactments. In 1873 an act was passed giving a wife who had no children or descendants of such children the right to dispose of policies formerly nonassignable: *Anderson v. Goldsmidt*, 38 Hun, 360; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493. In 1879, by an act referring in terms only to "policies of insurance issued within the state of New York," a married woman was permitted to assign practically all policies to which she held title, with the written consent of her husband. The effect of the statute, which seemed limited to policies issued in New York, was enlarged by the construction of the courts, by which it was made to cover policies issued outside the state: *Spencer v. Meyers*, 150 N. Y. 269, 55 Am. St. Rep. 675, 44 N. E. 942. Under this act it is immaterial whether the wife has or has not children living; she may assign in either case: *Anderson v. Goldsmidt*, 38 Hun, 360; *Spencer v. Myers*, 73 Hun, 274, 26 N. Y. Supp. 371. The written consent of the husband to the assignment is necessary: *Dannheuser v. Wallenstein*, 169 N. Y. 199, 62 N. E. 160; but with this and a few other exceptions, a policy of life insurance payable to the wife of the person insured may now be said to be upon the same footing in New York, as regards its assignability, as is any other policy.

IV. Who may be Assignee.

a. One Without Insurable Interest.

1. Generally—Conflict of Authority.—In the absence of some rule of public policy prohibiting it, a life insurance policy may, as we have seen (*supra*, p. 486), be assigned like any other chose in action. Here, however, as in other connections, "public policy" bears a different meaning in different courts. Practically the only disputed question with reference to who may be assignee is whether or not the assignment of a life insurance policy to one without an insurable interest in the life insured runs counter to a rule of

"public policy," and upon this question there is an irreconcilable conflict.

According to one view, a policy of life insurance, if valid in its inception, may be assigned to anyone for a valuable consideration, without regard to whether the assignee has an insurable interest in the life insured or not. Supporting this view are the courts of the following states: Connecticut, Illinois, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, New York, Ohio, Rhode Island, South Carolina, Tennessee, Wisconsin, and the supreme court of the United States: See *Fitzpatrick v. Hartford Life Ins. Co.*, 56 Conn. 116, 7 Am. St. Rep. 288, 13 Atl. 673, 17 Atl. 411; *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Succession of Hearing*, 26 La. Ann. 326; *Prudential Ins. Co. v. Liersch*, 122 Mich. 436, 81 N. W. 258; *Hague v. Minnesota etc. Co.*, 59 Minn. 39, 60 N. W. 812; *Brown v. Equitable etc. Soc.*, 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; *Murphy v. Red*, 64 Miss. 614, 60 Am. Rep. 68, 1 South. 761; *Chamberlain v. Butler*, 61 Neb. 730, ante, p. 478, 86 N. W. 481; *Valton v. National etc. Soc.*, 20 N. Y. 32; *Olmsted v. Keyes*, 85 N. Y. 593; *Steinback v. Diepenbrock*, 37 N. Y. Supp. 279, 1 App. Div. 417; *Eckel v. Renner*, 41 Ohio St. 232; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Crosswell v. Connecticut etc. Assn.*, 51 S. C. 103, 28 S. E. 200; *Clement v. New York Life Ins. Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650, 46 S. W. 561; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; *Strike v. Wisconsin etc. Ins. Co.*, 95 Wis. 583, 70 N. W. 819; *Aetna Life Ins. Co. v. France*, 94 U. S. 561. The cases of *Commack v. Lewis*, 15 Wall. 643, and *Warnock v. Davis*, 104 U. S. 775, frequently cited as decisions of the United States supreme court taking a contrary view, were both cases in which, as is said in *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245, "the policies were taken out by procurement of the assignees in order that they might be assigned to them under such circumstances as that they might well be held to be in evasion of the law prohibiting gaming policies." Such assignments are, of course, invalid, and the real position of this court is shown by its language in *Aetna Life Ins. Co. v. France*, 94 U. S. 561: "As held by us in the case of *Insurance Co. v. Schaefer*, 94 U. S. 457, just decided, any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a mere wager policy." Similar language is used in *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. Rep. 877. That the doctrine of the United States supreme court permits of assignments to one without an insurable interest, see *Chamberlain v. Butler* (principal case), 61 Neb. 730, ante, p. 478, 86 N. W. 481; *Crosswell v. Connecticut etc. Indemnity Assn.*, 51 S. C. 103, 28 S. E. 200; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290.

Arrayed upon the opposite side of this question are the courts of Alabama, Kansas, Kentucky, Missouri, North Carolina, Pennsylvania, Texas, and Virginia. According to the view finding recognition in these states, the assignment of a life insurance policy to one having no insurable interest in the life of the person insured is contrary to public policy and void: *Alabama Gold Mut. Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329, 1 South. 561; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517; *Price v. First Nat. Bank*; 62 Kan. 743, 64 Pac. 639; *Schlamp v. Berner*, 21 Ky. Law Rep. 324, 51 S. W. 312; *Burnam v. White*, 16 Ky. Law Rep. 241, 22 S. W. 555; *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336; *Powell v. Dewey*, 123 N. C. 103, 68 Am. St. Rep. 818, 31 S. E. 381; *Downey v. Hoffer*, 110 Pa. St. 109, 20 Atl. 655; *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. Rep. 570 (see, however, *Hill v. Insurance Assn.*, 154 Pa. St. 29, 35 Am. St. Rep. 807, 25 Atl. 771, 35 Am. St. Rep. 807; *Wheeland v. Atwood*, 192 Pa. St. 237, 73 Am. St. Rep. 803, 43 Atl. 946; *Cheeves v. Anders*, 87 Tex. 287, 47 Am. St. Rep. 107, 28 S. W. 274; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626; *Long v. Meriden Britannia Co.*, 94 Va. 594, 27 S. E. 499; *Manhattan Life Ins. Co. v. Hennessey*, 99 Fed. 64, 39 C. C. A. 625.

In both Indiana and Massachusetts the authorities are in conflict. In the former, however, it is probably the rule that assignments to one without an insurable interest are void: *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313. Contra, *Nye v. Grand Lodge*, 9 Ind. App. 131, 36 N. E. 249; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094; while in Massachusetts the weight of authority seems the other way: *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Dixon v. National Life Ins. Co.*, 168 Mass. 48, 46 N. E. 430; *Brown v. Greenfield Life Assn.*, 172 Mass. 498, 53 N. E. 129. Contra, *Stevens v. Warren*, 101 Mass. 564. In California the question is definitely settled by legislation. By Civil Code, 2764, it is provided that "a policy of insurance on life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it, whatever the insured might have recovered": See, also, *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Widaman v. Hubbard*, 88 Fed. 806. In New Jersey the rule prevails that a party taking out insurance upon the life of another need have no insurable interest therein, and a fortiori an assignee need have none: *Trenton Mut. etc. Ins. Co. v. Johnson*, 24 N. J. L. 576; *Vivar v. Knights of Pythias*, 52 N. J. L. 455, 469, 20 Atl. 36.

2. **Grounds of Opposing Views.**—The authorities holding invalid the transfer of a life insurance policy to one having no in-

insurable interest in the life of the person assured base the doctrine on the ground that the same reasons which condemn policies procured by one without an insurable interest in the life insured should apply to the transfer of a policy to one without such interest. Proceeding upon the ground that what the law will not permit to be done directly it will refuse to sanction when done indirectly, it is argued that if a policy taken out by one without an insurable interest is to be regarded as against public policy as a wagering contract and a speculation upon human life, a policy in the hands of one without such interest should be likewise regarded, however obtained. That the danger to the life of the party assured, arising from anyone having an interest in its termination without a corresponding interest in its continued existence, is present to an equal extent, whether the policy is obtained by contracting directly with the insurer or by purchase from another.

Upon the other hand, it is contended that no greater reason exists for prohibiting such transfer than could be urged against permitting one without an insurable interest to be beneficiary, and that it is undoubtedly permissible for one to take out insurance on his own life payable to any person he may nominate, whether or not the latter has an insurable interest. The temptation to take the life of the person insured is, it is said, equally great in both cases. In answer to the contention that the doctrine permitting of assignment to one without an interest is a recognition of wager policies, it is said that only those assignments which are bona fide and are not mere cloaks for wager are sustained: See *Steinback v. Diepenbrock*, 158 N. Y. 24, 70 Am. St. Rep. 424, 52 N. E. 662; *Stambaugh v. Blake* (Pa.), 15 Atl. 705; *Keystone etc. Assn. v. Norris*, 115 Pa. St. 446, 2 Am. St. Rep. 572, 8 Atl. 638; *Clement v. Insurance Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650, 46 S. W. 561; *Tate v. Commercial Bldg. Assn.*, 97 Va. 74, 33 S. E. 382; *Warnock v. Davis*, 104 U. S. 775; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Cammack v. Lewis*, 82 U. S. 643; *Brockway v. Mutual Ben. Life Ins. Co.*, 9 Fed. 249.

The view of those cases holding an insurable interest in the assignee seems preferable. It must be admitted, however, that the other is supported by the preponderance of authority, and seems to be more in line with the tendency of the later decisions.

3. When Death of Assured has Occurred.—When once the death insured against has occurred, a policy or the proceeds due under it are assignable to anyone, regardless of his lack of interest in the life insured. There is no longer any possibility of a wager in such a transaction, nor is the danger of temptation to take the life of the insured present. The claim has become a simple debt, and "after a loss and fixed liability attached, it is of no concern whatever to the insurer whether an assignee has or has not an interest in the life insured": *Curtiss v. Aetna Life Ins. Co.*, 90 Cal. 245,

25 Am. St. Rep. 114, 27 Pac. 211; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380.

b. **Creditor Taking as Security.**—A creditor is everywhere regarded as having an insurable interest in the life of his debtor to the extent of the debt at least, and it is well settled that a policy of life insurance may be pledged with or assigned to a creditor as collateral security for a debt due him from the person whose life is insured: *Curtis v. Aetna Life Ins. Co.*, 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Clogg v. McDaniel*, 89 Md. 416, 43 Atl. 795; *McDonald v. Birss*, 99 Mich. 329, 58 N. W. 359; *Warnock v. Davis*, 104 U. S. 775; *Connecticut Mut. Life Ins. Co. v. Fisher*, 30 Fed. 662. The amount of the debt must not, however, be so disproportionate to that of the policy as to lay the transaction open to attack as a wager: *Cooper v. Weaver* (Pa.), 11 Atl. 780; *McHale v. McDonnell*, 175 Pa. St. 632, 34 Atl. 966; *Cammack v. Lewis*, 82 U. S. 543. See for rights of creditors to whom a life insurance policy is assigned as security, post, p. 511.

V. Effect of.

a. **Title of Assignee.**—The assignment of a policy of life insurance, like that of any other property, has the effect of transferring to the assignee whatever interest the assignor may have had therein: *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Scott v. Dickson*, 108 Pa. St. 6, 56 Am. Rep. 192; *Mutual Protection Ins. Co. v. Hamilton*, 37 Tenn. 269.

Such policy is not, however, negotiable, and the assignee can take no better title and no greater interest than his assignor had to convey: *Norris v. Georgian Loan etc. Co.*, 109 Ga. 12, 34 S. E. 378; *Travelers' Ins. Co. v. Healey*, 86 Hun, 524, 33 N. Y. Supp. 911; *Culmer v. American Grocery Co.*, 48 N. Y. Supp. 431, 21 App. Div. 556; *Rousset v. Insurance Co. of North America*, 1 Binn. 429.

b. **Right of Assignee to Sue in His Own Name.**—In the absence of statute, the assignee of a life insurance policy, like the assignee of any other chose in action, can sue upon the policy only in the name of his assignor: *Palmer v. Merrill*, 6 Cush. 282, 52 Am. Dec. 782; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Pierce v. Charter Oak Life Ins. Co.*, 138 Mass. 151.

At the present day, however, under statutes passed both in England (31 & 32 Vict. [1867]), and in most of the states of the Union, the assignee of a policy of life insurance may, and in most cases must, sue thereon in his own name: *Crocker v. Hugin*, 103 Iowa, 243, 72 N. W. 411; *Sander v. Home etc. Soc.*, 72 Md. 511, 20 Atl. 137; *Brenman v. Franey*, 142 Pa. St. 301, 21 Atl. 803; *British Equitable Ins. Co. v. Great Western Ry. Co.*, 38 L. J. Eq. 132.

c. When Assigned as Security.

1. **Interest of Assignee.**—The assignment of a policy of life insurance to a creditor by way of security for a debt vests the legal

title to the policy in him. The interest of his assignor "is in what remains of it, after the advances for the security of which it was assigned have been satisfied," and until these advances have been paid the creditor may retain the policy: *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094.

2. Transfer Apparently Absolute may be Shown to be for Security.—It is not infrequently the case that an assignment to a creditor as collateral security for a debt is, upon its face, an absolute transfer. In such case, it is well established, parol evidence is admissible to prove the real intent of the parties, and the transaction may be shown to have been a transfer of security, and not a sale to the creditor: *Clarke v. Fast*, 128 Cal. 422, 61 Pac. 72; *Price v. First Nat. Bank*, 62 Kan. 743, 64 Pac. 639; *Dixon v. National Life Ins. Co.*, 168 Mass. 48, 46 N. E. 430; *McDonald v. Birss*, 99 Mich. 329, 58 N. W. 359; *Matthews v. Sheehan*, 69 N. Y. 585; *Cushman v. Family Fund Soc.*, 9 N. Y. Supp. 272; *Cunningham v. Smith*, 70 Pa. St. 450; *Page v. Burnstine*, 102 U. S. 664.

3. Amount Recoverable from Insurer by Creditor.—As between the creditor to whom a policy of life insurance is assigned as security for a debt and the insurer, it is immaterial that the debt so secured does not equal in amount the sum due under the policy. The creditor may nevertheless recover the full face value of the policy: *Gilman v. Curtis*, 66 Cal. 116, 4 Pac. 1094; *Gilman v. Curtis*, 3 Pac. 114; *Hale v. Life Indemnity etc. Co.*, 65 Minn. 548, 68 N. W. 182; *Wright v. Mutual etc. Assn.*, 118 N. Y. 237, 16 Am. St. Rep. 749, 23 N. E. 186; *Page v. Burnstine*, 102 U. S. 664; *Widaman v. Hubbard*, 88 Fed. 806; *Swick v. Home Ins. Co.*, 2 Dill. 160, Fed. Cas. No. 13,692. See, also, *Cheeves v. Anders*, 87 Tex. 287, 47 Am. St. Rep. 107, 28 S. W. 274; *Manhattan Life Ins. Co. v. Hennessy*, 99 Fed. 64, 39 C. C. A. 625.

4. Title to Proceeds in Hands of Creditor.—The right to recover the whole amount of the policy does not, however, carry with it the right to retain it. The transfer having been for security only, the creditor can retain only so much of the fund recovered as is necessary to reimburse him for the debt and advances made by him. Beyond that he has no right to the proceeds of the policy, but holds the excess in trust for the parties legally entitled thereto. In some states (see *supra*, p. 508), the assignment of a life insurance policy is permitted only when the assignee has an insurable interest in the life of the person, and then only to the extent of that interest. In these states the right of the creditor to retain more of the proceeds than is necessary for his reimbursement is, of course, denied, whether the assignment was absolute or by way of security merely: *Culver v. Guyer* (Ala.), 29 South. 779; *Morris v. Georgia Loan etc. Co.*, 109 Ga. 12, 34 S. E. 378; *Embry v. Harris*, 21 Ky. Law Rep. 714, 52 S. W. 958; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 16 Am. St. Rep. 893, 12 S. W. 621; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626; *Cawthon v. Perry*, 78

Tex. 383, 13 S. W. 268; *Roller v. Moore*, 86 Va. 512, 10 S. E. 241; *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475. See, also, *Cammack v. Lewis*, 82 U. S. 643; *Warnock v. Davis*, 104 U. S. 775; *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621, 12 Sup. Ct. Rep. 749.

In those jurisdictions the courts of which hold assignments of life insurance policies valid, without reference to the existence or extent of an insurable interest in the assignee, the rule is limited in its application to cases in which the policy was transferred as security for a debt. When such is ascertained to have been the contract intended by the parties, the creditor can retain no more than is due him upon the debt and for advances made by way of paying the premiums or otherwise: *Metropolitan Life Ins. Co. v. O'Brien*, 92 Mich. 584, 51 N. W. 1012; *Bohleber v. Waelden*, 150 N. Y. 405, 44 N. E. 1041; *Rison v. Wilkerson*, 35 Tenn. 565; *Jones v. New York Life Ins. Co.*, 15 Utah, 522, 50 Pac. 620; *McQuillan v. Mutual etc. Assn. (Wis.)*, 87 N. W. 1069; *Widaman v. Hubbard*, 88 Fed. 806.

5. **By Whom Premiums are Payable.**—In the absence of some agreement to the contrary, it is well settled that the assignor of a policy transferred by way of security for a debt is not bound to pay the premiums which may become due thereon. "In case of a mortgage, or assignment of a policy of life insurance as collateral security for a debt, with right of redemption, the assured is not relieved from the obligation to pay the premiums in order to keep the policy alive, according to the requirement of the contract of insurance, unless it be by some arrangement between the company and the mortgagee; nor is the mortgagee bound, in the absence of some agreement with the mortgagor to that effect, to keep the policy alive and subsisting, by the payment of the premiums as they may accrue due": *Dungan v. Mutual Ben. Life Ins. Co.*, 46 Md. 469. And to the same effect are *Killoran v. Sweet*, 72 Hun, 194, 25 N. Y. Supp. 295; *Dusenberry v. Mutual Life Ins. Co.*, 188 Pa. St. 454, 41 Atl. 736. Receipt by the insurer of the premiums due on an insurance policy will not amount to an assent by the insurer to the assignment, nor to a new contract with the assignee enabling him to recover on the policy in an action brought in his own name: *United States Life Ins. Co. v. Ludwig*, 103 Ill. 305; nor will it constitute a waiver of a provision requiring the assent to be in writing and indorsed on the policy: *National Mut. Aid Soc. v. Lupold*, 101 Pa. St. 111.

d. Invalid Assignments.

1. **Effect upon Policy.**—A void assignment does not, in the absence of a provision in the contract to that effect, avoid the policy assigned. The invalidity of the transaction extends to the transfer only, and not to the contract of insurance. The assignee takes no title, but the policy still remains a valid and binding obligation of

the insurer: *Crocker v. Hugin*, 103 Iowa, 243, 72 N. W. 411; *Marcus v. St. Louis Mut. Life Ins. Co.*, 68 N. Y. 625; *Quinn v. Supreme Council etc.*, 99 Tenn. 80, 41 S. W. 343; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 16 Am. St. Rep. 893, 12 S. W. 621.

The converse of this is equally true. Where a policy provides that it shall be void if assigned without the consent of the company, or if assigned in any but the prescribed manner, the provision renders the policy void at the option of the company, but does not affect the validity of the assignment. As is said in *Merrill v. New England Ins. Co.*, 103 Mass. 245-252, 4 Am. Rep. 548: "The condition does not prevent the transfer or pledge of the policy. It reserves to the company the right to give or refuse its consent to such transfer, and if made without its consent, to avoid its contract altogether. The effect of the condition is to defeat the policy, not to defeat the transfer." See, also, *Hewins v. Baker*, 161 Mass. 320, 27 N. E. 441.

2. **Recovery of Premiums Paid by Assignee.**—One taking a policy of life insurance under an assignment, when the attempted transfer is void for any reason, may, it is well settled, recover for any premiums paid by him in keeping the policy alive. Such payments are regarded as having been made in behalf of the party legally entitled to the policy: *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305, 91 Am. Dec. 725; *Morris v. Georgia Loan etc. Co.*, 109 Ga. 12, 34 S. E. 378; *Harley v. Heist*, 86 Ind. 196, 44 Am. Rep. 285; *Nye v. Grand Lodge*, 9 Ind. App. 131, 36 N. E. 429; *Planters' State Bank v. Willingham*, 23 Ky. Law Rep. 445, 63 S. W. 12; *Unity Mut. etc. Assn. v. Dugan*, 118 Mass. 219; *Heusner v. Mutual Life Ins. Co.*, 47 Mo. App. 336; *City Sav. Bank v. Whittle*, 63 N. H. 587, 3 Atl. 645; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493; *Connecticut Mut. Life Ins. Co. v. Van Campen*, 11 N. Y. Supp. 103; *Mutual Life Ins. Co. v. Terry*, 62 How. Pr. 325; *Stambaugh v. Blake* (Pa.), 15 Atl. 705; *Downey v. Hoffer*, 110 Pa. St. 109, 20 Atl. 655; *Lewy v. Gilliard*, 76 Tex. 400, 13 S. W. 304; *Stevens v. Germania Life Ins. Co.* (Tex.), 62 S. W. 824.

e. **Conflict of Laws.**—Where an assignment of a policy of life insurance is made in a jurisdiction other than that in which the contract of insurance was effected, the law of the place of assignment controls, both as to the right of the assignor to make and of the assignee to receive the assignment. The assignment is regarded as a contract, separate and distinct from that contained in the policy, and is governed by the law of the place where it is made, without any reference to the rule of law in the place where the policy was issued or the insurance money is made payable: *Connecticut Mut. Life Ins. Co. v. Woods*, 52 Conn. 586; *Union Cent. Life Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Criswell v. Whitney*, 13 Ind. App. 67, 41 N. E. 78; *Barry v. Equitable Life Assur. Soc.*, 59 N. Y. 587; *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651; *Cannon v. Northwest Mut. Life Ins.*

Co., 29 Hun, 470; *Newcomb v. Mutual Life Ins. Co.*, Fed. Cas. No. 10,147; *Lee v. Abdy*, L. R. 17 Q. B. Div. 309.

VI. Certificate of Membership in Mutual Benefit Associations.

a. *Nature of.*—The rules applicable to policies of life insurance generally are in the main equally applicable to certificates of membership in mutual benefit societies. Such certificates have all the essential elements of life insurance. "Life is the risk and death is the event upon which the insurance money is payable. There is not, as in ordinary contracts or policies, a stipulation for the payment of premiums fixed and certain in amount, at the inception of the risk, and at periods definitely appointed during its continuance. The payment of the fee for admission to membership, and of the assessments levied and required by the commandery, are the equivalent of premiums, and form the pecuniary consideration of the contract. . . . Nor is the character or legal effect of the contract varied because the objects and purposes of the association are benevolent and charitable, rather than speculative, or the derivation of profits from the transaction of business. There are many such associations, having various names and similar objects and purposes, which are in contemplation of law, mutual life insurance companies, and as such their contracts are construed and enforced by the courts. Policies or certificates issued by them have the essentials and characteristics of such contracts: the payment by one party in some form and under some designation, of a pecuniary consideration, and the observance of prescribed duties during the continuance of the risk, and the promise and obligation of the other party when death happens to pay the sum assured": *Supreme Commandery etc. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332. To the same effect, see *Black v. Valley Mut. Ins. Assn.*, 52 Ark. 201, 20 Am. St. Rep. 166, 12 S. W. 477; *Elkhart Mut. Aid etc. Assn. v. Houghton*, 98 Ind. 149; *Bolton v. Bolton*, 73 Me. 299. The applicability of the rules of law governing life insurance policies to certificates of membership in associations of this class may, of course, be affected by the peculiar organization, objects, and policy of such societies, but unless these considerations are of controlling force, the rules governing the two classes of insurance are the same: *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657. For an extended discussion of the nature of mutual benefit societies, see monographic notes to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 781, and to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 543, 561.

b. *Assignability of.*—A certificate of membership in a mutual benefit association is, like the ordinary policy of life insurance (see *supra*, p. 486), a chose in action, and assignable: *Swift v. Railway Passenger etc. Assn.*, 96 Ill. 309; *Supreme Council v. Tracy*, 169 Ill. 123, 48 N. E. 401; *Gary v. Northwest Masonic Aid Assn. (Iowa)*, 50 N. W. 27; *Crocker v. Hogin*, 103 Iowa, 243, 72 N. W. 411; *Souder v. Home Friendly Soc.*, 72 Md. 511, 20 Atl. 137; *Brown v. Man-*

sur, 64 N. H. 39, 5 Atl. 768; Klinekhamer Brewing Co. v. Cassman, 21 Ohio. C. C. 465, 12 Ohio C. D. 141. It is not essential that the by-laws of the society in terms make the certificate assignable. It is assignable unless its transfer is prohibited by the constitution or by-laws: Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; Carpenter v. Knapp, 101 Iowa, 712, 70 N. W. 764. Where, however, the assignment of the certificate is prohibited by its terms, an attempted transfer by this method is of course void: Haigh v. Mentor Council, Legion of Honor, 17 Phila. 71. Even where the assignment of a certificate is prohibited, it may, nevertheless, be so conveyed if the association has been enjoined from further prosecution of business. In such case the certificate amounts to no more than any other claim upon the assets of the society: Fogg v. Order of the Golden Lion, 159 Mass. 9, 33 N. E. 692.

c. **Requisites to Assignment of.**—In the absence of some provision in the certificate of membership, or in the constitution and by-laws of the association, the assignment of the certificate need not be written: Brown v. Mansur, 64 N. H. 39, 5 Atl. 768. It may, of course, be written, and the certificate transferred by indorsement and delivery: Norwood v. Guerdon, 60 Ill. 253; Bushnell v. Bushnell, 92 Ind. 503. Merely writing upon the back of the certificate that the sum should be distributed among certain named beneficiaries, if nothing more is done, is, however, not a sufficient assignment: St. Clair County Ben. Soc. v. Fietsam, 97 Ill. 474.

In general, the requisites to a valid transfer of such a certificate are the same as those prescribed for the assignment of a life insurance, and which are hereinbefore considered: Supra, p. 490 et seq. Where, however, a mode of assignment is provided by the by-laws of the society, that mode must be followed in order to make any assignment valid as against the association: Wallace v. Bankers' etc. Assn., 80 Mo. App. 102; National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111; Hotel Men's etc. Assn. v. Brown, 33 Fed. 11; and cases cited in note to Lake v. Minnesota etc. Assn., 52 Am. St. Rep. 561, 562. These provisions prescribing certain formalities as requisite to a valid assignment are, however, construed as being for the protection of the society, which alone can take advantage of a failure to comply with them. If, therefore, the society waives its right to demand compliance with such provisions, which waiver is usually indicated by paying the insurance money into court, no other person can attack the assignment upon the ground that the manner prescribed has not been followed: Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Manning v. A. O. U. W., 86 Ky. 136, 9 Am. St. Rep. 270, 5 S. W. 385; Anthony v. Massachusetts Ben. Assn., 158 Mass. 322, 33 N. E. 577; Kimball v. Lester, 59 N. Y. Supp. 540, 43 App. Div. 27; Masonic Aid Assn. v. Marshall, 10 Pa. Co. Ct. Rep. 270; Ramsay v. Myers, 6 Pa. Dist. Rep. 468; Splawn v. Chew, 60 Tex. 532; Supreme Con-

clave v. Capella, 41 Fed. 1. Contra, Harman v. Lewis, 24 Fed. 97, 530. When once the rights of the beneficiaries have vested by reason of the death of the member, no waiver by the society can affect those rights: McLaughlin v. McLaughlin, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; Wendt v. Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. 470.

d. **Who may Assign.**—In no other connection is the distinction between the law relating to life insurance generally and that relating to mutual benefit associations so sharply marked as in connection with the rights of the beneficiary. In life insurance generally, the beneficiary takes, as we have seen (*supra*, pp. 497, 498), a vested interest in the policy from the moment it is issued payable to him. This interest he alone may assign, and cannot be divested of it by any assignment or change of the policy by the party who effected the insurance. The beneficiary named in a certificate of membership in a mutual benefit society, on the other hand, takes a mere contingent interest, an expectancy, which cannot become a vested interest until the death of the assured, and which may be defeated by the member at any time: Jory v. Supreme Council, Legion of Honor, 105 Cal. 20, 45 Am. St. Rep. 17, 38 Pac. 524; Rollins v. McHatton, 16 Colo. 203, 25 Am. St. Rep. 260, 27 Pac. 254; Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; Supreme Council v. Tracy, 169 Ill. 123, 48 N. E. 401; Milner v. Bowman, 119 Ind. 448, 21 N. E. 1094; Masonic Mut. Ben. Soc. v. Burkhart, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; Nye v. Grand Lodge, 9 Ind. App. 131, 36 N. E. 429; Carpenter v. Knapp, 101 Iowa, 712, 70 N. W. 764; Schrelinger v. Boes, 85 Ky. 357, 3 S. W. 427; Marsh v. American Legion of Honor, 149 Mass. 512, 21 N. E. 1070, Anthony v. Massachusetts Ben. Assn., 158 Mass. 322, 33 N. E. 577; Michigan etc. Assn. v. Rolfe, 76 Mich. 146, 42 N. W. 1094; Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596; Masonic Ben. Assn. v. Bunch, 109 Mo. 560, 19 S. W. 25; Wells v. Covenant etc. Assn., 126 Mo. 630, 29 S. W. 607; Supreme Conclave v. Dailey (N. J. Eq., Oct. 1900), 47 Atl. 277; Sabin v. Phinney, 134 N. Y. 423, 30 Am. St. Rep. 681, 31 N. E. 1087; Lawler v. National etc. Assn., 83 Hun, 393, 31 N. Y. Supp. 875; Fischer v. American Legion of Honor (Pa.), 31 Atl. 1089; Thomas v. Grand Lodge, 12 Wash. 500, 41 Pac. 882; Mutual Reserve Fund Life Assn. v. Cleveland Woolen Mills, 82 Fed. 508, 27 O. C. A. 212. Contra, Manning v. A. O. U. W., 86 Ky. 136, 9 Am. St. Rep. 270, 5 S. W. 385. The beneficiary named in a certificate of membership cannot, of course, pass by any assignment more than he possesses—a mere expectancy. In some cases his right to do even this is denied. Thus, in Richmond v. Johnson, 28 Minn. 447, 10 N. W. 596, it is said that the expectancy of such beneficiary is not property, and in Michigan etc. Assn. v. Rolfe, 76 Mich. 146, 42 N. W. 1094, that it is not an interest which could be assigned. This, however, seems opposed to the weight of authority, and the better rule

would seem to be that the interest of the beneficiary, although entirely contingent and merely expectant, is, nevertheless, an interest which may be assigned by him. As is said by Bradley, J., in *Lawler v. National Life Assn.*, 83 Hun, 393, 31 N. Y. Supp. 375: "The beneficiary, nevertheless, had an interest in a sense inchoate or inceptive in character; to become vested in the event that it should not be revoked by the insured during his life. It was something more than a mere possibility. Nothing was to be done requisite to the perfection of her right to the fund on his death except payment of the dues and assessments; but some action on the part of the insured was required to defeat it. The effect of the contract was that the defendant should then pay to her the stipulated sum, unless he, the assured, in the meantime should terminate her relation as beneficiary by the appointment of another. It would, therefore, seem that hers was a possibility coupled with an interest, and that her interest had such potential existence as to enable her, by assignment, to transfer, and the assignee to take it, subject to the condition applicable to her relation as such beneficiary. This would clearly be so in equity: Citing cases. There is no apparent reason why, upon such facts, it is not so at law." Even were the interest of the beneficiary no more than a mere possibility or expectancy, its assignment, if made for a valid consideration, would in equity be treated as an agreement, and would take effect when the possibility ripens into an actuality by reason of the death of the assured: *Supreme Conclave v. Dailey* (N. J. Eq., Oct., 1900), 47 Atl. 277.

In *Black v. Valley Mut. Ins. Assn.*, 52 Ark. 201, 20 Am. St. Rep. 166, 12 S. W. 477, what has been termed an "exceptional doctrine" is laid down. It is there held that in the absence of some provision in the by-laws permitting it, the assured may not change the beneficiary named in the certificate, and that a provision to the effect that the certificate might be "assigned" did not give the assured this right, its effect being merely to permit "assignment" by the beneficiary, and not "substitution of beneficiaries" by the member. The validity of this holding is, however, extremely doubtful: See *Carpenter v. Knapp*, 101 Iowa, 712, 70 N. W. 764; *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657.

When once the death of the assured has taken place, the interest of the beneficiary becomes a vested one, and his right of disposal absolute: *Aiken v. Massachusetts Ben. Assn.*, 13 N. Y. Supp. 579.

e. Who may be Assignee.

1. **One Without Insurable Interest.**—The same sharp conflict of authority already noted (*supra*, pp. 507-509) as to the validity or invalidity of the assignment of a policy of life insurance to one without an insurable interest in the life insured exists where the instrument assigned is a certificate of membership in a mutual benefit society. The only objection to such assignee taking is one founded

in public policy, and it is evident that the doctrine applicable to the one form of insurance is equally applicable to the other, and the courts will be found aligned upon the same side of the disputed question with reference to both. Under one line of authorities, the certificate of membership may be assigned to anyone, whether possessed of an insurable interest or not. In other jurisdictions, one not possessed of an insurable interest in the life covered by the certificate may not be assignee, and one possessed of such interest can retain the proceeds only to the extent of that interest. Illustrative of the former view, see the following cases: *Moore v. Chicago etc. Soc.*, 178 Ill. 202, 52 N. E. 882; *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Milner v. Bowman*, 119 Ind. 448, 21 N. E. 1094; *Strike v. Wisconsin etc. Life Ins. Co.*, 95 Wis. 819, 70 N. W. 819; *Lamont v. Hotel Men's Mut. Ben. Assn.*, 30 Fed. 817; *Lamont v. Grand Lodge*, 31 Fed. 180. In *McFarland v. Creath*, 35 Mo. App. 112, it is held that one may be an assignee though without an insurable interest, and even although he could not have been the original beneficiary by reason of a by-law of the society limiting the beneficiaries who may be named to those having an insurable interest in the life of the member. This is doubtful, and under a very similar state of facts the contrary was held in *Michigan Mut. Ben. Assn. v. Rolfe*, 76 Mich. 146, 42 N. W. 1094, the court saying: "What public policy would not sanction when done directly cannot be enforced when accomplished through indirection. The assignment to Rolfe is subject to the same rule of construction affecting its legality as would be applied had Lyon, instead of assigning the certificate, surrendered it to the company, and taken a new one, naming Rolfe as his beneficiary." For cases taking the view that any assignment to one without an insurable interest is void, see *Stoelker v. Thornton*, 88 Ala. 241, 6 South. 680; *Basye v. Adams*, 81 Ky. 368; *Hotapp v. Hotapp*, 9 Ky. Law Rep. 649; *Klinckhamer Brewing Co. v. Cassman*, 21 Ohio C. C. 465, 12 Ohio C. D. 141; *Schonfield v. Turner*, 75 Tex. 324, 12 S. W. 626.

2. **One Outside Designated Class of Beneficiaries.**—The charter or by-laws of mutual benefit associations usually designate certain classes of persons, ordinarily the relatives and dependents of the member, as the ones to whom the insurance may be made payable. In such case, it is uniformly held that the assignment of a certificate to one not included in any of the classes named is void; as is said in the recent case of *Rose v. Wilkins*, 78 Miss. 401, 29 South. 397: "The association only agrees to pay a benefit to a certain class of persons as objects of its charity, and is bound only to the terms of its contract; and the restriction of payment to such persons inhered in the contract, by whomsoever held, whether holding by assignment or otherwise." To the same effect, see *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; *Anthony v. Massachusetts Ben. Assn.*, 158 Mass. 322, 33 N. E. 577; *Briggs v. Earl*, 139 Mass. 473; 1 N. E. 847; *Brierly v. Equitable Aid Union*,

170 Mass. 218, 64 Am. St. Rep. 297, 48 N. E. 1090; Michigan Mut. Ben. Assn. v. Rolfe, 76 Mich. 146, 42 N. W. 1094; Aiken v. Massachusetts Ben. Assn., 34 N. Y. St. Rep. 697, 13 N. Y. Supp. 579; Odd Fellows etc. Assn. v. Diebert, 2 Ohio C. C. 462. Where, however, "heirs," "devisees" or "legatees" are included among the classes designated, it is held that the member may appoint a stranger as beneficiary, and consequently that such person may take as assignee: Bloomington Mut. Ben. Assn. v. Blue, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; Moore v. Chicago etc. Soc., 178 Ill. 202, 52 N. E. 882; Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657; Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429; Basye v. Adams, 81 Ky. 368; Wallace v. Bankers' etc. Assn., 80 Mo. App. 102; Lamont v. Iowa Legion of Honor, 31 Fed. 177.

f. Effect of Assignment of.—As to the effect of the assignment of a certificate of membership in a mutual benefit association, but little need here be added to what has already been noted in connection with the effect of the assignment of the ordinary life policy: *Supra*, p. 510 et seq. It is well to note, however, that the assignment of such a certificate does not confer any of the personal privileges of a member of the association upon the assignee, nor does it give him any interest in a permanent fund, which, according to the charter of the association, is to be used for the benefit of members only: *Basye v. Adams*, 81 Ky. 368.

HENNI v. FIDELITY BUILDING AND LOAN ASSN.

[61 Neb. 744, 86 N. W. 475.]

CORPORATIONS, FOREIGN—NONCOMPLIANCE WITH LAW—VOID CONTRACT.—A contract made within the state by a resident thereof with a foreign building and loan association, which has not complied with the laws of the state authorizing it to do business therein, is void. The contracting parties cannot avoid compliance with the laws by stipulating that their contract shall be construed by the laws of some other state. (p. 520.)

CORPORATIONS, FOREIGN—NONCOMPLIANCE WITH STATE LAW—COMITY.—If it is against the settled policy of the state to permit foreign corporations to transact business therein without first complying with the requirements of its laws, judicial comity does not require that active aid be given to the enforcement of contracts made by such corporations, which interfere with and tend to frustrate such policy. (p. 520.)

Lane & Murdock, for the appellant.

McGilton & Herring and C. S. Lobingier, for the respondents.

745 NORVAL, C. J. The Fidelity Building and Loan Association, a corporation organized under the laws of Colorado, commenced suit in Douglas county to foreclose a mortgage on real estate situate in that county, executed to it by Paul Henni to secure the payment of a certain loan made by the former to the latter. In the contract it was stipulated that it should be considered as having been made under and construed by the laws of the state of Colorado. Plaintiff, a foreign building and loan association, had not at the time the contract was made, complied with section 17, chapter 14 of the Session Laws of 1891, which, among other things, declares that it shall not be lawful for a foreign building and loan association, directly or indirectly, to transact any business in this state without first procuring a certificate of approval and authorization **746** from the auditor of public accounts, state treasurer and attorney general, or any two of them, etc. In the absence of compliance with this law in the particular mentioned, is this mortgage enforceable? We can hardly, since the decision in Commonwealth Mut. Fire Ins. Co. v. Hayden, 60 Neb. 637, 83 Am. St. Rep. 545, 83 N. W. 922, consider this question open to dispute; for while there the policy of a foreign insurance company was under consideration, the same questions of law were involved. The following language employed by Mr. Justice Sullivan in that case is also applicable to building and loan associations organized outside this state: "The statute prescribing the conditions upon which foreign insurance companies may do business here is a police regulation designed to protect our people against irresponsible insurers. It forbids them to do any insurance business, directly or indirectly, in this state, until they have complied with its terms; and the principle of judicial comity does not require our courts to actively aid in the enforcement of contracts which interfere with, and tend to frustrate, the policy established by the legislature." In Barbor v. Boehm, 21 Neb. 450, 32 N. W. 221, we held that a premium note given for insurance to a foreign company that had not complied with the law is void, and cannot be enforced.

If it is against the settled policy of this state, as announced by legislative enactments, to permit foreign associations or corporations like the plaintiff to transact business in this state without first complying with the requirements of the statutes—a law with which, presumably, a worthless or irresponsible organization could not comply—it is not in the power of the

contracting parties to avoid such compliance by stipulating in their contract that it shall be construed by the laws of some other state.

We are fully aware of the criticism of *Barbor v. Boehm*, 21 Neb. 450, 32 N. W. 221, made by Mr. Justice Post in *American Building etc. Assn. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493. What was there said was mere dictum, and it is expressly stated in the opinion that it was not the opinion of the other members of the ⁷⁴⁷ court. The decisions of this court cited in that connection as in conflict with the *Boehm* case are readily reconcilable with it, and with the latter we are well content. In the act of 1891 the legislature clearly outlined the policy of this state relative to foreign building and loan associations. It was clearly the intention of the legislature that such associations as refused to comply with the conditions there imposed upon them should be excluded from doing business in this state, and that any business so transacted by them should be unlawful, which latter seems to us quite as strong a word as void. It is not enough to say that, because the legislature denounced a penalty upon those who transgressed the prohibition, it was the intention of that body that the business transacted by such associations should not be void. It was plainly the intention of the legislature to go further than merely to punish those who transgressed the statute, and to render all contracts made by the associations of that character "unlawful"—nugatory, void.

In further reply to the contention that this is a Colorado contract, because the parties so stipulate, is payable in Colorado, and one of the parties is resident in that state, we might say that the business which resulted in the defendant Henni becoming a member of this association, as well as that which resulted in the making of the loan, was all transacted in Nebraska, in violation of the statute, by an agent of the association resident in this state: *Building etc. Assn. v. Bilan*, 59 Neb. 458, 81 N. W. 308.

The judgment of the lower court in favor of the plaintiff is therefore reversed, and the cause is remanded with instructions to enter a judgment in favor of the defendants.

A Foreign Corporation doing business in a state without complying with and in defiance of its laws cannot insist that its courts, as an exercise of comity, give effect to its contracts with citizens of the state: *Commonwealth Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922; *Seamens v. Temple Co.*,

105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. 408; *Swing v. Munson*, 191 Pa. St. 582, 71 Am. St. Rep. 772, 43 Atl. 342; *Rose v. Kimberly*, 89 Wis. 545, 46 Am. St. Rep. 855, 62 N. W. 526; *Cowan v. London Assur. Co.*, 73 Miss. 321, 55 Am. St. Rep. 535, 19 South. 298. Compare *Garratt Ford Co. v. Vermont Mfg. Co.*, 20 R. I. 187, 78 Am. St. Rep. 852, 37 Atl. 948; *Edison etc. Co. v. Canadian etc. Co.*, 8 Wash. 370, 40 Am. St. Rep. 910, 36 Pac. 260; *Swing v. Munson*, 191 Pa. St. 582, 71 Am. St. Rep. 772, 43 Atl. 342; *State etc. Ins. Assn. v. Brinkley etc. Co.*, 61 Ark. 1, 54 Am. St. Rep. 191, 31 S. W. 157; *Foster v. Betcher Lumber Co.*, 5 S. Dak. 57, 49 Am. St. Rep. 859, 58 N. W. 9.

HOGG v. REYNOLDS.

[61 Neb. 758, 86 N. W. 479.]

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY FOR RENT.—If a lessee assigns his whole estate in all the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease. (p. 523.)

LANDLORD AND TENANT—ASSIGNMENT OF LEASE.—COVENANT TO PAY RENT runs with the land, and the assignee of the lease, being in privity of estate with the landlord, is directly liable to him for the installments of rents accruing while the relation lasts. (p. 523.)

LANDLORD AND TENANT—PRIVITY OF ESTATE.—WHETHER ASSIGNMENT of the lessee's interest destroys the privity of estate subsisting between him and the landlord, and creates that relation between the landlord and the transferee, depends upon the estate demised and the estate transferred being precisely the same. (p. 523.)

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEE.—An assignee of a lessee's entire interest in a distinct portion of leased land is, as to such part, in privity of estate with the landlord, and liable to him for the entire rent therefor, but as to the portion of the land not covered by the assignment, there is no such privity, and the assignee is not liable for the rent therefor. (p. 523.)

Steele Brothers and Hastings & Hall, for the appellants.

G. P. Sheesley, M. Miller, and C. H. Aldrich, for the respondent.

759 SULLIVAN, J. This was an action brought by N. B. Hogg against George P. Reynolds to recover the sum of one hundred dollars claimed to be due as rent upon a farm lease. The jury found in favor of the defendant and judgment was rendered on the verdict. The facts essential to an understanding of the case may be compressed into a few sentences: George E. and N. B. Hogg owned a section of land in Butler county which they leased to D. M. Frey and

T. A. Kirkpatrick for five years at an annual rental of five hundred dollars. Afterward, the lessees having made a division between themselves of the demised premises, Frey, to whom had been assigned the exclusive right to use and occupy the west half of the section, made a transfer of his interest to the defendant by the following indorsement upon the lease:

"Know all men by these presents, that I, D. M. Frey, do hereby sell, assign, and set over to Geo. P. Reynolds, all my right, title, and interest in the within lease, the same being the privilege of paying $\frac{1}{2}$ half of the sum named in the within lease, and the undivided use of the west half of said section 29, town 13, range 3 east, for the unexpired part of the five years named within. Witness my hand this the day and year last written above.

(Signed) "D. M. FREY.

"Witnessed by H. S. CRAIG."

Under this arrangement the defendant entered into possession of the west half of the leased land and occupied the same during the life of the lease, paying to the plaintiff, who is now the sole owner of the reversion, one-half of the entire rent as the several installments became due. Kirkpatrick, who held exclusive possession of the east half of the section, having failed to pay his share of the last installment of rent due to the plaintiff, this action was instituted against Reynolds on the theory that he had, by the assignment, succeeded to the rights and assumed the liabilities of Frey.

The doctrine of the authorities undoubtedly is that ⁷⁶⁰ where a lessee assigns his whole estate in all the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease. The covenant to pay rent runs with the land, and the assignee, being in privity of estate with the landlord, is directly liable to him for the installments accruing while that relation exists: *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920; *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917; 2 *Taylor on Landlord and Tenant*, 8th ed., sec. 436; 12 *Am. & Eng. Ency. of Law*, 1st ed., 738. Whether a person claiming an interest in real property under a lessee is liable upon the covenant to pay rent, or upon other covenants running with the land, depends upon the existence of privity of estate between such person and the lessor. In other words, whether a transfer of the lessee's interest destroys the privity of estate subsisting between him and the landlord, and creates that rela-

tion between the landlord and the transferee, depends upon the estate demised and the estate transferred being precisely identical: *Sutliff v. Atwood*, 15 Ohio St. 186; *Woodhull v. Rosenthal*, 61 N. Y. 382; 1 *Parsons on Contracts*, 8th ed., *231; *Tiedeman on Real Property*, sec. 182; 1 *Washburn on Real Property*, 5th ed., 541. The estate vested by the lease in Frey was an undivided interest for a term of years in the whole of the land. The estate transferred by Frey to Reynolds was an exclusive right for a limited period to use and occupy the whole of the west half of the land. The legal effect of the division of the property between the lessees was to make each, during the term, the sole owner of a specific moiety. Frey, by the arrangement between himself and Kirkpatrick, became possessed of the entire interest of both lessees in the west half of the section; and the assignment of this interest to the defendant established between him and the plaintiff a privity of estate as to a distinct part of the land. Having previously relinquished his interest in the east half of the section, it is quite evident that Frey had neither the power nor purpose, by the assignment written on the lease, to transfer ⁷⁶¹ to the defendant any right or interest in that part of the demised premises. Being possessed of the whole estate of both lessees in part of the land, the defendant was liable to the plaintiff for a proportionate share of the rent: *Fulton v. Stuart*, 2 Ohio, 216, 15 Am. Dec. 542; *Curtis v. Spitty*, 1 Bing. N. C. 756; *Van Rensselaer v. Bradley*, 3 Denio, 135, 45 Am. Dec. 451; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Babcock v. Scoville*, 56 Ill. 461. In the last-mentioned case it is said, page 467: "Where a covenant running with the land is divisible in its nature, if the entire interest in different parcels of the land passes by assignment to different individuals, the covenant will attach upon each parcel pro tanto, and the assignee will be answerable for his proportion only of any charge upon the land, which was a common burden upon the whole." In *Van Rensselaer v. Bradley*, 3 Denio, 135, 45 Am. Dec. 451, the rule with respect to the apportionment of rent in cases like the one before us is thus stated by Mr. Justice Jewett: "The rent must be apportioned, when the landlord seeks to recover of an assignee for a part of the premises according to the value of the land, and it is the business of the jury upon evidence produced to apportion the rent to the value of the land." No case holding a contrary doctrine has been brought to our attention,

and it is believed none can be found. The defendant having paid one-half of each installment of rent maturing after the assignment was executed, and there being no evidence to show that he was liable for more, the verdict was necessarily right, and the judgment must, therefore, be affirmed.

The Assignment of Leases is discussed in the monographic note to *Washington Natural Gas Co. v. Johnson*, 10 Am. St. Rep. 575-565; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943, 32 S. W. 1097. The assignee of a leasehold estate is liable for the rent according to the terms of the lease, but the fact of his liability does not discharge the original tenant from his covenant to pay rent: *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820. A privity of estate is created between the original lessor and the assignee: *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481, 40 N. E. 857; *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 16 Am. St. Rep. 274, 21 N. E. 920.

Covenants Running with the Land are discussed in the monographic note to *Geiszler v. De Graaf*, 82 Am. St. Rep. 664-690.

BROWN v. NEILSON.

[61 Neb. 765, 86 N. W. 498.]

LIEN ON PROPERTY NOT IN EXISTENCE—CREATION BY LEASE.—A provision in a lease that all property belonging to the lessee that shall be on the leased premises, or shall be brought thereon by him during the term of the lease, shall be holden as security for the rent reserved, until it is paid, and shall be and remain a lien from year to year until payments for the rents for the entire term have been fully discharged and paid, is ineffectual to create a lien, legal or equitable, in favor of the landlord for rent due and in arrears on the crops grown thereafter on the leased premises, and on other property not in being at the time and thereafter brought on the leased premises by the lessee. (pp. 526, 534.)

LIEN ON PROPERTY NOT IN BEING.—STIPULATIONS IN A LEASE are ineffectual to create a lien, legal or equitable, in favor of the landlord for rents due and in arrears on crops thereafter grown upon the leased premises, or on property brought thereon by the lessee, but not in esse at the time of the execution of the lease. (p. 534.)

J. P. Breen and C. S. Lobingier, for the appellant.

Duffie, Gaines & Kelby, for the respondents.

765 HOLCOMB, J. Suit was instituted by the plaintiff below, appellant here, for the recovery of the sum of nine hundred dollars, alleged to be due as rental for the use of

a farm occupied by defendants Neilson, appellees, as tenants under a written lease for a term of years. The rent claimed to be due was for the full year beginning March 1, 1895, and the first half of the year beginning March 1, 1896. The lease of the premises, upon which plaintiff based his right of action, ⁷⁰⁶ was executed October 30, 1893, and being for the term of four years, commencing on the first day of March, 1894. In the petition, joined with the allegations for a recovery of a money judgment, the plaintiff pleaded a certain stipulation contained in the lease which, it is averred, gave to him a lien in equity on all the property of whatsoever description on the leased premises or brought thereon and belonging to the lessees, as security for the rent due and in arrears under the terms of the lease; and prayed a decree establishing a lien upon all such property for the amount for which judgment should be rendered in the action. On plaintiff's application a restraining order was also issued enjoining the lessees from transferring or removing any of their property from the leased premises. The answer denied the right of the plaintiff to a lien on any of the defendants' property for any sum, and raised other issues not here necessary to further notice. On the trial of the case, the plaintiff recovered a judgment for the amount prayed, with interest, but was denied any relief on his application to have the amount found due to be a lien on the defendants' personal property, as prayed for in his petition. From the finding and decree denying him a lien, he appeals.

The clause in the lease, which is made the foundation for the plaintiff's claim to the enforcement of a specific lien in his favor on all the property of the defendants Neilson on the leased premises, is as follows: "And it is further expressly agreed and understood by and between the parties hereto, that all property of every name, character and description, belonging to said parties of the second part, that shall be on said premises or brought thereon by said second parties, during the term of this lease, shall be holden as security for the payment of the rents above reserved until all be paid, and the same shall be and remain a lien upon the same from year to year, until said payments of the rents for said entire term have been fully discharged and paid." Under these sweeping provisions the plaintiff contends that he is entitled ⁷⁰⁷ to have a lien decreed in his favor for the amount for which he obtained judgment, on all personal property of all

kinds belonging to the lessees, which they had belonging to them on the leased premises at the time of the service of the restraining order, issued as aforesaid. Just what this property is, is more or less involved in doubt, but it is claimed by appellant that a schedule of property and claim of exemption, filed by the lessee with the sheriff of the county, who appears to have been about to levy an execution thereon in another action, furnishes sufficient evidence as to the description and identity of the property to which his lien should attach. The claim of exemption was made by the lessee as the head of a family, and filed with the sheriff after the issuance of the restraining order in the case at bar. In it the defendant claimed his specific exemptions allowed him by statute, and in addition thereto property of the value of five hundred dollars, he being, as alleged, the head of a family engaged in the business of agriculture and having no lands or town lots. The schedule of property showed items of personal property ordinarily belonging to one engaged in agriculture, such as cattle, horses, agricultural implements, and household goods; also about fifty acres of growing corn and about thirteen hundred bushels of corn in the crib.

It is suggested by counsel for defendants that a stipulation of the character under consideration cannot in equity be extended to cover and include the exempt property of the defendant allowed by law as the head of a family engaged in the business of agriculture, citing in support thereof, *Vinson v. Hallowell*, 10 Bush, 538, and *Seiling v. Gunderman*, 35 Tex. 544. We prefer to address ourselves to the principal question presented by the appeal, and that is, whether a valid lien may be created on any property by the method adopted in this case; and, if so, in what manner can the lien be made effective. Whether any of the property was in existence at the date of the execution of the lease is doubtful. Certain it is that all of it was unidentified and in no way described ⁷⁶⁸ in the instrument, except as it might afterward be brought on the leased premises; and for the most part the property consisted of growing corn and corn in the crib, not in existence until some time after the defendant occupied the leased premises, under the lease by which plaintiff claims.

Plaintiff's counsel, in his opening brief, concedes that the instrument conveyed no present lien on the property of the lessee afterward raised or brought on the demised premises; but contends that the stipulation quoted should be construed

as an agreement by the lessee to give a lien on all such property, after being brought on the premises, which ought to be enforced in equity in a suit to collect the rents in arrears, by a decree in the nature of specific performance, in pursuance of the familiar maxim that "equity regards as done that which ought to be done." In the reply brief by different counsel it is argued that the rule first stated is not broad enough, and that the instrument itself, and by virtue of its own force, should be treated as creating a lien or mortgage on the property, although not in existence at the time of the execution of the lease, and which attaches as an equitable lien when the property comes into being and within the terms of the stipulation, and that the lien is capable of enforcement in a court of equity. The stipulation does not comprehend, within its meaning, that the lessee will, after the property is acquired, execute a mortgage or other instrument encumbering the property for the benefit of the lessor. No original and independent contract creating a new lien can be inferred as the intention and contemplation of the parties, without doing violence to the language used. It does not purport to be an agreement to give, in the future, a lien on the property then owned by the lessees on the leased premises; but, by its own terms and provisions, the instrument evidences an attempt to establish a lien in future on property at the time not in esse. It is a contract, or attempt at contract, for a sale and transfer by way of mortgage, and not a contract to ⁷⁶⁹ give a mortgage. If it is ineffectual to create a lien on the after-acquired property, we are of the opinion that it cannot, under any well-recognized rule, be made the foundation for a decree in the nature of specific performance, conceding that, in a proper case, a court of equity will decree specific performance of a contract of a sale of, or to give a mortgage on, chattel property. Unless the stipulation under consideration in the instrument can be upheld as creating, in favor of the lessor, a lien, legal or equitable, on the crops grown on the leased premises, or on property brought thereon after the execution of the lease, we think it must entirely fail as having any vitality or force for any purpose. It is not argued, nor will it be seriously contended, that the clause quoted conveys any legal interest in or lien on the property of the lessee not then in existence or owned by him, but which was afterward brought into existence and on the leased premises. The authorities are unani-

mous that a legal estate or interest cannot be conveyed in property which has no existence. The question then is, Will such an agreement create a lien of an equitable character, attaching to the property when it comes into existence and is brought within the terms of the stipulation in other respects? On this the authorities are divided. The exact nature of the contract, therefore, becomes material in arriving at a proper conclusion. Such a contract is usually defined as executory in character, requiring something further to be done in the future by the parties thereto, before a good title will pass to and be perfected in the lessor or mortgagee.

In an early case, and one that is frequently cited by the courts holding to the doctrine that property not in esse is not the subject of transfer by way of mortgage, it is said, regarding the nature of such a contract: "A stipulation that future acquired property shall be holden as security for some present engagement is an executory agreement, of such a character that the creditor with whom it is made may, under it, take the property into ⁷⁷⁰ his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good": *Moody v. Wright*, 13 Met. 17, 32, 46 Am. Dec. 706.

In deciding the validity of a contract executory in character, under which a lien was claimed, this court, in an early case (*Lanphere v. Lowe*, 3 Neb. 131, 138), citing with approval a decision of the supreme court of Massachusetts, held that a valid lien could not thus be created. *Gantt, J.*, speaking of a stipulation in a lease of real estate similar to the one under consideration, says: "But it was an effort on the part of the defendant to create a lien, somewhat in the nature of a chattel mortgage, upon a something not in esse. Can a valid charge be made upon a thing not in existence?"

I think it cannot. It is a very ancient rule of law that a man cannot grant or charge that which he has not; and in *Jones v. Richardson*, 10 Met. 488, it is said that this 'is a maxim of law too plain to need illustration, and which is fully supported by all the authorities': Bacon's Abridgment, 'Grants,' D, 2; *Codman v. Freeman*, 3 Cush. 309; 2 Kent's Commentaries, 703; *Head v. Goodwin*, 37 Me. 187; *Robinson v. Macdonnell*, 5 Maule & S. 228; *Chynoweth v. Tenney*, 10 Wis. *400. This doctrine is applied to mortgages of goods which may be subsequently acquired by the mortgagee; it is equally applied to sales of personal property, and rights of property: ⁷⁷¹ *Chesley v. Josselyn*, 7 Gray, 490; *Rice v. Stone*, 1 Allen, 569."

And again, after mature consideration, the doctrine enunciated in the *Lanphere* case was approved, followed, and reiterated in *New Lincoln Hotel Co. v. Shears*, 57 Neb. 478, 73 Am. St. Rep. 524, 78 N. W. 25. Speaking on the same subject, says Cobb, J., who delivered the opinion of the court in *Cole v. Kerr*, 19 Neb. 553, 555, 26 N. W. 598: "There is, to say the least of it, great confusion of the authorities on the point being considered, but after a careful examination of those cited on either side in this case I have reached the conclusion that, as a question of law, the lien of a chattel mortgage of a crop of corn not planted at the time of its execution and delivery will not attach to the corn when it comes into existence until it is seized by the mortgagee, or until, in the language of a member of the court in the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, 'a new intervening act.' Until then it remains a mere license, and until acted upon it conveys neither a lien nor a right of property which the mortgagee can assert against a purchaser or execution creditor of the mortgagor."

The authorities appear to be almost, if not entirely, unanimous in support of the rule announced in the case last cited, to the effect that no legal estate or interest in or lien upon property, not in existence at the time of the execution of the instrument, passes to the grantee therein named by virtue of the instrument itself; and that the agreement, purporting to convey the property or give a lien on such property, when not in existence, is executory in character, in the nature of a license or continuing agreement requiring a further and new act in order to transfer any legal title or lien to the grantee or mortgagee. In addition to the authorities cited

in the two decisions of this court, heretofore quoted from, the following are directly in point: *Chapman v. Weimer*, 4 Ohio St. 481; *Long v. Hines*, 40 Kan. 220, 10 Am. St. Rep. 192, 19 Pac. 796; *Lunn v. Thornton*, 1 Man., G. & S. 379, 50 Eng. Com. Law, 379; *Williams v. Briggs*, 11 R. I. 476, 23 Am. Rep. 518, and cases therein cited.

⁷⁷² The more difficult question, as heretofore stated, arises with respect to an equitable lien being thus created, which attaches to the property when it comes into being, and title thereto is acquired by the grantor, and regarding which there exists an irreconcilable conflict in the authorities. It is contended by counsel for plaintiff in the case at bar, and held by many respectable authorities, that notwithstanding the property, on which he seeks a lien, was not in esse when the lease was executed, that after the crops were raised on the demised premises, belonging to the lessor, and still remaining thereon, a lien in equity attached thereto, the enforcement of which should be permitted by resort to and the application of equitable rules and principles. The same argument, of course, applies to the other personal property afterward acquired and subsequent to the execution of the lease brought on the premises. What counsel contends for amounts substantially to the enforcement of a landlord's lien, not only on the crops grown on the leased premises, but also on all the personal property of the lessee brought thereon after the execution of the lease, without any statutory authority therefor. This is sought to be accomplished by the very general terms of the stipulation in the lease heretofore quoted. It is admitted that no legal title passed when the lease was signed, and that there then existed no property on which a lien could operate. But it is said that the stipulation will in equity establish what in law it is incapable of doing—that is, although under the law no valid interest or lien passes to the lessor, yet an equitable lien arises in his favor and attaches to the property when it comes into existence; that, notwithstanding it is void in law—without a new act—it is valid in equity; that, by the application of the equitable doctrine contended for, a valid equitable lien may be created, not only on the crops raised on the leased premises for the year in which the lease was executed, but also as many years thereafter as the term of the lease covers—two, five, ten, or a quarter of a century; ⁷⁷³ and that such lien covers not only the crops raised on the premises, but as well all other prop-

erty acquired and brought thereon by the lessee. We do not think this can be accomplished by the application of any sound equitable principle.

In the view of the case now under consideration, the expression of Cobb, J., in *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 598, becomes pertinent. "Soil alone," says he, "does not produce crops of corn in this degenerate age, if it ever did. It now requires, in addition to soil and seed, labor both of man and beast. So that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach and come into efficacy without 'a new intervening act,' upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed—something which I never heard contended for in this country, but which is a right which, under the name of peonage, is recognized in our sister republic to the south of us."

In *New Lincoln Hotel Co. v. Shears*, 57 Neb. 478, 73 Am. St. Rep. 524, 78 N. W. 25, it was contended by those arguing for the validity of a clause in a lease, similar in its general terms to those in the present case, that the subsequent mortgagees of the property, who it is admitted had notice of the provisions for a lien in the lease, could not, therefore, question its validity. To this it is observed by Ryan, C.: "We cannot see that the validity of the provision of the lease is affected by this consideration. Whether or not a chattel mortgage or its equivalent can be made so as to affect future acquired property is a question entirely dependent upon general principles independent of statute." In *Steele v. Ashenfelter*, 40 Neb. 770, 42 Am. St. Rep. 694, 59 N. W. 361, Post, J., speaking for the court on the same subject, says: "It will be seen from this statement that the question presented is, whether, as against Hale, the execution plaintiff, the mortgage includes the after-acquired property of the mortgagor. The question thus presented is one upon which the authorities are by ⁷⁷⁴ no means harmonious. The doctrine of *Holroyd v. Marshall*, 10 H. L. Cas. 191, has been recognized by many of the courts in this country. In those jurisdictions the rule is that while at law a mortgage of after-acquired property confers no rights as against purchasers and attaching creditors, in equity it is effectual to charge the property, when acquired by the mortgagor, with an equitable lien, which will prevail not only as against the latter, but also as against

attaching creditors. The distinction above noted between the rule at law and in equity can of course have no place under our practice where the two remedial systems are blended into one. Therefore, if the corporation, for which the plaintiff stands, by its mortgage acquired a lien which is enforceable in equity as against the execution plaintiff, such lien is available to him in this action. If the question was an open one in this state, the cases which recognize the rule in *Holroyd v. Marshall*, 10 H. L. Cas. 191, would be entitled to great consideration, but we regard it as settled by the case of *Cole v. Kerr*, 19 Neb. 553, 26 N. W. 598, in which it is distinctly held that a mortgage of a crop to be planted conveyed no lien upon crops subsequently raised by the mortgagor as against judgment creditors of the latter."

Says the supreme court of Wisconsin, in *Chynoweth v. Tenney*, 10 Wis. (397, 403), 341, 346: "But it is contended further that, although this interest may be inoperative at law, yet that it was effectual to establish an equitable lien, and the decision of Judge Story, in *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9673, and the authorities by him cited, are relied on to support this position. But we think the doctrine of this case had been so fully denied by subsequent cases that it cannot be considered as law: Citing a number of cases. And in *Congreve v. Evetts*, 10 Ex. 307, Parke, B., says that such a conveyance 'gave no legal title, nor even equitable title, to any specific goods.' Other cases, to the same effect, might be cited, but we deem it unnecessary." The rule adopted by the Wisconsin court, just cited, has been approved and followed in *775 Farmers' Loan Co. v. Commercial Bank*, 11 Wis. (207), 215; *Single v. Phelps*, 20 Wis. (398), 419; *Mowry v. White*, 21 Wis. 417; *Lemson v. Moffat*, 61 Wis. 153, 21 N. W. 62, and other cases. See, also, *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711; *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83.

Loftin v. Hines, 107 N. C. 360, 12 S. E. 197, is a case involving the validity of a lien by virtue of an instrument in the nature of a mortgage on crops to be grown two or three years in the future, in which it is stated in the syllabus: "A mortgage executed in 1888 on crops to be cultivated during 1889, 1890, and 1891, conveys no title, legal or equitable, which can be enforced by claim and delivery." And in the opinion says Clark, J., voicing the views of the court: "Unless said mortgage conveyed to the plaintiff either a legal or equitable

title to the crop of 1889, the plaintiff cannot recover. It is held by Davis, J., in *Wooten v. Hill*, 98 N. C. 52, 3 S. E. 846: "The authorities do not warrant the conveyance of an indefinitely prospective unplanted crop, and we think it should be limited to crops planted, or about to be planted, as the crops next following the conveyance"; that is, the crops of the year current when the mortgage is executed. This case is to the same purport as the opinion by Pearson, C. J., in *Mastin v. Marlow*, 65 N. C. 695, and it has been cited and approved by Smith, C. J., in *State v. Harris*, 98 N. C. 733, 4 S. E. 633, by Shepherd, J., in *Smith v. Coor*, 104 N. C. 139, 10 S. E. 466, and by Avery, J., in *Taylor v. Hodges*, 105 N. C. 344, 11 S. E. 156. We think the mortgage was invalid as a conveyance of title, either legal or equitable, to the crop of 1889, and the proceeding by claim and delivery must fail." It seems in that state that a valid mortgage may be executed on unplanted crop for the current year.

In an early English case the rule is stated as follows: "That, if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant so as to prevent its passing to the assignees of the insolvent, ⁷⁷⁶ and then the assignment would make that equitable title a legal one but if it was only an agreement to mortgage furniture to be subsequently acquired—to give a bill of sale at a future day of the furniture and other goods of the insolvent—then it would cover no specific furniture, and would confer no right in equity": *Mogg v. Baker*, 3 Mees. & W. 194.

The natural and logical deduction to be made from the authorities above cited is that the agreement under which the plaintiff claims, being executory in its nature and not fully executed, is insufficient to pass any legal interest in, or equitable lien on, the property on which the lien is claimed, because not then in existence, and that the trial court committed no error in denying the plaintiff any relief by way of enforcement of a specific lien thereon for the amount for which he obtained judgment. Our court has long been committed to this doctrine, and there appears no sufficient reason to depart therefrom. Our code has blended the remedies at law and in equity, both of which are now to be administered by one form of action, denominated a civil action. It is a familiar maxim that "equity follows the law." Applying this maxim, it is frequently held that a contract imposing no legal obligation

cannot be enforced in equity: Snell on Principles of Equity, 17; this rule, of course, having its proper application and limitations. The contract in the present instance is not the result of a mistake or failure of the parties to correctly express their intentions in the stipulation creating the alleged lien. It amounts only to a mere license, which to become effective for the purpose of creating a valid lien requires a change of possession of the property when or after acquired. Until a new act intervenes, no sufficient title passes to the lessor which he can enforce at law or in equity, nor is he entitled to relief by the application of any recognized rule of equity, under the doctrine of specific performance.

In the examination of the case we have not been unmindful ⁷⁷⁷ of the authorities to which our attention has been directed, as well as many others examined in our consideration of the questions involved, in support of the plaintiff's contention that the stipulation creates in his favor an equitable lien which ought to be recognized. This line of cases is not in harmony with the doctrine of this court, as heretofore expressed, and must, for that reason, be disregarded as authority. The precedents which we have heretofore established should, in our judgment, be followed and adhered to.

It is claimed by appellant that the affidavit and claim of exemption made by the lessee, heretofore referred to, established a ratification and affirmation of the lien of the plaintiff under his lease. The affidavit was made in another case, and in no wise was related to, or connected with, the contract of lease, except as it referred to it as being a paramount lien on the property. It was made and filed with the sheriff holding an execution to save the property from levy on the ground that it was exempt under the statute. After claiming his specific exemptions, which were enumerated, the appellee stated that certain growing corn, describing it, and a quantity of corn in the crib, was claimed under the statutory exemption of property of the value of five hundred dollars, the affiant not being the owner of lands or lots, and that all of said property (i. e., the property claimed under the exemption of five hundred dollars in value) "is encumbered by and subject to a lien for accrued rent due from me for the premises upon which the said corn was raised and is located, to the owner of the land in the sum of nine hundred dollars, and that the same is an encumbrance and a lien upon all of said property prior and paramount to any claim for exemptions which I now

assert or claim against it. That the encumbrance and lien for said rent upon said property was created and established by myself and wife signing a written contract to that effect long prior to the levy of the execution levied by you on said property." While the affidavit was, perhaps, evidence of the construction the defendant ⁷⁷⁸ put upon the contract of lease, it in no way changes the legal relations of the parties, and so far as the statement—that a lien existed on the property by virtue of the stipulation in the lease—is concerned, it, at most, was only his opinion of its legal force and effect, which would not alter or change the principles of law involved and applicable under the issues joined in the present action. The lien referred to could only be perfected by a new act, which had not then been performed.

The judgment of the district court is affirmed.

An Unplanted Crop may be mortgaged: *Hall v. Glass*, 123 Cal. 500, 69 Am. St. Rep. 77, 56 Pac. 336. The mortgage lien will attach to the crop as soon as it comes into existence: *Donovan v. St. Anthony etc. Elevator Co.*, 7 N. Dak. 513, 66 Am. St. Rep. 674, 75 N. W. 809. See, further, the monographic notes to *Forsyth Mfg. v. Castlen*, 81 Am. St. Rep. 44; *Moody v. Wright*, 46 Am. Dec. 713; *Gregg v. Sanford*, 76 Am. Dec. 725; and the recent case of *Bidgood v. Monarch Elevator Co.*, 9 N. Dak. 627, 81 Am. St. Rep. 604, 84 N. W. 561. So crops thereafter to be grown may be the subject of a valid sale: See the monographic note to *Forsyth Mfg. Co. v. Castlen*, 81 Am. St. Rep. 44.

AMES v. PARROTT.

[61 Neb. 847, 86 N. W. 503.]

WITNESSES—ATTESTATION—INTEREST.—If a statute, in order to secure evidence of some act, requires it to be done in the presence of, or attested by, a specified number of persons, an implication arises that these persons shall be such as are not directly interested in the act. A person having such interest is not a competent attesting witness. (p. 539.)

ATTACHMENT.—SPECIAL STATUTORY PROVISIONS RESPECTING THE MANNER in which a levy of an attachment shall be made must be strictly observed, and a departure therefrom invalidates the levy. (p. 539.)

ATTACHMENT—ATTESTING WITNESSES—PLAINTIFF IN ATTACHMENT.—If the statute provides that the sheriff levying an attachment go to the place where the property of the defendant may be found, and declare in the presence of two residents of the county, who shall be attesting witnesses, that by virtue of the order he attaches such property at the suit of the plaintiff, the

statute is not complied with by a levy and declaration in the presence of two persons, one of whom is the plaintiff in attachment. (pp. 537, 542.)

TRIAL—APPELLATE PRACTICE.—If no reply to material allegations of new matter in an answer is shown by the record, and other issues appear therefrom upon which the case might have properly been tried, it is not presumed on appeal that it was tried upon the matters admitted by the pleadings. (p. 544.)

TRIAL—APPELLATE PRACTICE.—No advantage can be taken on appeal of failure to reply below where trial was had on the theory that a reply had been filed, unless there is something in the record from which an inference may be drawn that reply was waived, or from which the court may ascertain what issues were actually tried. (p. 544.)

NEW TRIAL.—TIME WITHIN WHICH MOTION for a new trial must be filed is to be calculated from the date of rendition of the judgment, and not from the date of entry thereof. (p. 544.)

NEW TRIAL.—MOTION for new trial is unnecessary if the error complained of is that the pleadings, taken together, do not support the judgment. (p. 544.)

Hamilton & Maxwell, for the appellant.

Cowin & Abbott and L. Helsley, for the respondent.

848 POUND, C. Parrott, hereinafter referred to as plaintiff, sued Ames, hereinafter styled defendant, setting up five causes of action for services rendered and money loaned. An order of attachment was issued at the instance of the plaintiff and levied upon the lands of the defendant. The latter moved to discharge the attachment on the ground that the levy was irregular and invalid, and is here upon error from the order of the court overruling such motion, and from the judgment of the court in favor of the plaintiff upon the main case.

The sheriff's return shows that upon receipt of the order of attachment he went to the lands to be levied upon and attached them "in the presence of J. B. Parrott and F. P. Salmon, two residents of Douglas county, state of Nebraska." It appeared in evidence upon the motion to discharge the attachment, and the court found that "the J. B. Parrott named by the officer in his return to said order of attachment and Jerome B. Parrott, plaintiff herein, are one and the same person," and it does not appear and is not claimed that any person other than said Parrott and Salmon was present at the time of the levy. For these reasons the defendant contends that the requirements of the statute were not complied with and that the levy is invalid. The code (section 205) provides that in levying an attachment the officer "shall go to the place

where the defendant's property may be found, and there in the presence of two residents of the county, declare that by virtue of said order he attaches said property at the suit of such plaintiff; and the officer, with the said residents, who shall be first sworn or affirmed ⁸⁴⁹ by the officer, shall make a true inventory and appraisement of all the property attached, which shall be signed by the officer and residents, and returned with the order." Is the plaintiff in attachment, being a resident of the county, a proper person to witness the levy and declaration thereof by the sheriff under this section? Requirements of this nature are very common in attachment statutes, and are to be found in some of the earliest statutes upon the subject. In the most recent statutes the tendency is to substitute a requirement that a copy of the writ and proceedings be filed with the recorder or register of deeds. But in either case, the obvious purpose is to make the levy public and notorious, to prevent attachment liens from attaching secretly and by surreptitious entries and indorsements, and to enable the other party to inquire into the date of and circumstances attending the levy; and the courts have so construed them: *Bryant v. Duffy*, 128 Mo. 18, 30 S. W. 317; *Root v. Columbus etc. R. R. Co.*, 45 Ohio St. 222, 12 N. E. 812. If this is the purpose of the requirement, we think that it follows that no person having a direct interest in the levy is a competent witness thereof.

In the analogous cases of attesting witnesses to deeds and mortgages it is well settled that they must be without direct or certain legal interest in the act attested. Interested parties have also been held disqualified from attesting a chattel mortgage (*Seibold v. Rogers*, 110 Ala. 438, 18 South. 312), or a signature to a note by mark, required by statute to be attested: *Chadwell v. Chadwell*, 98 Ky. 643, 33 S. W. 1118. The object of requiring attestation of deeds and other instruments is to enable the other party to inquire into the circumstances attending the sealing and delivery (*Markley v. Swartzlander*, 8 Watts & S. 172); and although the incompetency of grantees or parties directly interested in conveyances to attest their execution has sometimes been put upon the ground of common-law incapacity to testify to the facts in court, and sometimes upon construction ⁸⁵⁰ of particular statutes (*Child v. Baker*, 24 Neb. 188, 38 N. W. 725), the prevailing and better view is that public policy is the true basis thereof: *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437; *Donovan v. St. An-*

thony etc. Elev. Co., 8 N. Dak. 585, 73 Am. St. Rep. 779, 80 N. W. 772. We are not unaware, in reaching this conclusion, that the common-law disqualifications of witnesses by reason of interest have been done away with; nor have we overlooked that disqualification of interested attesting witnesses having been rested by some upon incompetency to testify in court, the removal of the latter disqualification has sometimes been thought to obviate the former: *Fisher v. Porter*, 11 S. Dak. 311, 77 N. W. 112. But we prefer to adhere to those authorities which recognize an inherent disqualification resting upon public policy and unaffected by the change in the rules of evidence. In *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. 437, the court says: "The true reason of the disqualification we apprehend is, that to permit a grantee to attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on the grantors, and afford reasonable assurance to those who deal with or on the faith of such instruments that they are genuine and represent bona fide transactions." In *Donovan v. St. Anthony etc. Elev. Co.*, 8 N. Dak. 585, 73 Am. St. Rep. 779, 80 N. W. 772, the court, quoting from the foregoing, adds: "But not only is the construction contended for by respondent repugnant to the intent and purpose of the statute, but it is, we think, entirely out of harmony with its language as commonly understood; for we think men generally understand it to mean the calling in of a person who is not a party to a transaction to hear and see its consummation, and subscribe his name as a witness to what the parties have in his presence consummated, and that parties to the contract are disqualified to act in ⁸⁵¹ that capacity; and such is the weight of authority." In *Winsted Sav. Bank etc. Assn. v. Spencer*, 26 Conn. 194, it is held that a statute requiring conveyances of land to be attested by two witnesses implies that the witnesses are to be disinterested. Likewise in *Horbach v. Tyrrell*, 48 Neb. 514, 521, 67 N. W. 485, 488, this court said: "It would seem that on grounds of public policy an officer should be disqualified from taking acknowledgment whose direct and beneficial interest would be subserved in having the conveyance made which he acknowledged." Without citing other instances, it is evident that where the law, in order to secure

evidence of some act, requires it to be done in the presence of, or attested by, a specified number of persons, an implication arises that these persons shall be such as are not directly interested in the act and beneficiaries thereof. This conclusion is rendered the more certain in respect to the statute here in question because it is provided that the same persons who witness the levy shall inventory and appraise the attached property, which could not be done, with any propriety, by an interested party. As Parrott, plaintiff in the attachment, was not a competent witness of the levy thereof, the case stands as if the sheriff had made his levy and declaration in the presence of one witness only, and we have further to consider the effect of such an irregularity thereon.

It is a well-established rule that where there is a special statutory provision respecting the manner in which levy of an attachment shall be made, it must be strictly observed, and that departure therefrom will invalidate the levy: 1 Shinn on Attachment and Garnishment, sec. 207; Drake on Attachment, secs. 194, 236a; 3 Ency. of Pl. & Pr. 54; Fairbanks v. Bennett, 52 Mich. 61, 63, 17 N. W. 696; Cary v. Everett, 107 Mich. 654, 65 N. W. 566; Main v. Tappener, 43 Cal. 206; Norvell v. Porter, 62 Mo. 309; Gates v. Tusen, 89 Mo. 13, 21, 14 S. W. 827; Bottoms v. McFerran, 19 Ky. Law Rep. 1266, 43 S. W. 236. Not only have very small irregularities in other respects been held fatal to the levy,⁸⁵² but the courts have uniformly enforced strict observance of requirements designed to insure publicity and notoriety, and to preserve evidence of the time and circumstances of the levy. Failure to levy or make declaration thereof before witnesses, under substantially the same requirement as in our statute, has been decided to be fatal repeatedly: Tiffany v. Glover, 3 G. Greene, 387, 393; Marnine v. Murphy, 8 Ind. 272; Earthman v. Jones, 2 Yerg. 484; Cabeen v. Douglass, 1 Mo. 336. Under more recent statutes prescribing some form of written or recorded notice in addition to or as a substitute for declaration before witnesses, strict and entire compliance with the statutory requirements has been exacted: Stanton v. Boschert, 104 Mo. 393, 16 S. W. 393; Bryant v. Duffy, 128 Mo. 18, 30 S. W. 317; Sharp v. Baird, 43 Cal. 577; Smith v. Brown, 96 Ga. 274, 23 S. E. 849; Thompson v. White, 25 Colo. 226, 54 Pac. 718; Steinfeld v. Menager (Ariz.), 53 Pac. 495. In Stanton v. Boschert, 104 Mo. 393, 16 S. W. 393, it appeared that a requirement that an abstract of the attachment be filed with the

recorder had been substituted for an older requirement of declaration of levy before a witness. The court held that no lien could be acquired unless such abstract was filed as required by the statute. In *Bryant v. Duffy*, 128 Mo. 18, 30 S. W. 317, the same question arose, and counsel suggested that the case just cited referred only to priorities between different attaching creditors. But the court said that the requirement in question, being a substitute for levy and declaration before witnesses, "was intended to constitute part of a complete and valid levy," and that "by a failure of the sheriff to file the required abstract no valid attachment of the property was made." In *Sharp v. Baird*, 43 Cal. 577, the statute required the sheriff, in attaching land, to post a copy of the attachment in a conspicuous place on the premises. The sheriff, instead of posting a copy of the attachment, posted a notice thereof, and the attachment was held invalid. Nothing has been cited to the contrary. It is argued that *Tiffany v. Glover*, 3 G. Greene, 387, is overruled⁸⁵³ by *Rowan v. Lamb*, 4 G. Greene, 468. But in *Rowan v. Lamb*, 4 G. Greene, 468, the real question involved was whether deficiencies in a return could be supplied by parol, and what presumption arose where the details of the levy were not returned. In *Tiffany v. Glover*, 3 G. Greene, 387, the court had held that omission in the return to recite all the statutory steps was fatal. In *Rowan v. Lamb*, 4 G. Greene, 468, the court overrules *Tiffany v. Glover*, 3 G. Greene, 387, as to this, but does not suggest that the prior ruling as to the necessity of levy and declaration before witnesses was unsound. In *Gapen v. Stephenson*, 18 Kan. 140, the defect complained of was not in the levy, but that one of the appraisers was not a householder. Appraisal is not required in order to secure notoriety and publicity in the levy, but for the benefit of the attachment debtor, and the court held that in the absence of prejudice such irregularity, not going to the right of the plaintiff to have an attachment, was not fatal. In this connection we may notice the suggestion made at the hearing that the defect here in question could not be taken advantage of by the attachment defendant, but only by other attaching creditors or claimants of the property who might be injured thereby. Examination of the authorities discloses no ground for such distinction, and in *Bryant v. Duffy*, 128 Mo. 18, 30 S. W. 317, it was expressly repudiated. The true distinction is between requirements after levy intended solely for the benefit of the debtor,

and those intended for the protection not only of the debtor, but of the public generally, by insuring a public and notorious levy, the time and circumstances whereof do not depend for evidence merely upon such entry as an officer may make in secret, but are subject to proof by records or disinterested witnesses: *Root v. Columbus etc. R. R. Co.*, 45 Ohio St. 222, 228, 12 N. E. 812. It appears that afterward, when about to appraise the property levied upon, the sheriff called one John H. Butler to assist therein, and that the appraisalment was made by Salmon and Butler, the plaintiff taking no part. The court found that the levy was made as above described, and that "thereafter" ⁸⁵⁴ the sheriff called Salmon and Butler to make the appraisalment, and that the defendant had failed to show prejudice by reason of the fact that Butler, who took part in the appraisalment, was not one of the residents who witnessed the levy, as required by the statute. What would be the effect of calling a person to appraise who was not present at the levy, we need not decide, since the real point, overlooked in the findings of the lower court, is as to the effect of failure to make the levy and declaration thereof before two witnesses. The subsequent calling in of Butler did not obviate this defect, since no levy and no declaration in his presence is claimed. For the foregoing reasons we are of opinion that the motion to discharge the attachment should have been sustained.

Exception is also taken to the judgment in the main case for the reason that no reply was filed to the answer of the defendant wherein he set up an accord and satisfaction as to the first cause of action in the petition. The judgment is general, and it does not appear upon which of the causes of action it was rendered, but it is conceded that the amount thereof could only be sustained by a finding for the plaintiff upon each. That material allegations of new matter in an answer will stand admitted unless replied to is firmly established by recent and repeated decisions of this court. But it is argued that the answer in the case at bar contains no material allegations of new matter requiring reply, and also that the cause was tried below on the theory that the affirmative allegations of the answer were denied, and hence that reply was waived, or at least the failure to reply may not be urged at this time. In the first cause of action plaintiff alleged that he commenced work for defendant in November, 1890, as a salesman and collector, and continued in his employment

for the period of fifty-two and two-thirds months. He further alleged that at the time he entered such service the parties orally agreed upon a compensation of seventy-five dollars a month for the period of one year; that at the expiration of the year they agreed orally to continue said contract ⁸⁵⁵ indefinitely, and that for the services rendered the defendant agreed to pay four thousand eight hundred and fifty dollars. There were four other causes of action. The answer was a general denial as to the four last causes of action. As to the first, it admitted that "the plaintiff commenced work for the defendant in November, 1890, as a salesman" and denied "each and every other allegation and part of allegation in the said first cause of action contained." Further answering, it alleged that in November, 1892, the defendant paid the plaintiff the sum of three thousand five hundred dollars, and that such sum was in full payment, and was accepted by the plaintiff in full payment, of one thousand dollars theretofore loaned and "for all services rendered by said plaintiff in any sum whatever." We take it no issue is raised as to the length of service by admitting that some work was done and denying the other allegations. This would be consistent with fifty-two months' service instead of the fifty-two and two-thirds alleged, and in this respect is comparable to the answer in *Gray v. Elbling*, 35 Neb. 278, 53 N. W. 68. But the petition alleges also a contract to pay a stipulated compensation for one year and a subsequent extension of said contract to the whole term of service. If there was such a contract admitted, so that a fixed and liquidated sum was due thereunder, the plea of payment and acceptance of a less sum would not state a defense. But the answer denied these and all other allegations of the petition, except the rendition of the services; and even though it must be construed as admitting the whole service alleged, it put in issue the alleged agreement to pay seventy-five dollars a month therefor and the alleged extension: *Ruth v. Ruth*, 12 Neb. 594, 12 N. W. 108; *Smiley v. Anderson*, 28 Neb. 100, 44 N. W. 86. In other words, the answer admits the service, denies the contract to pay a fixed compensation, so that the liability would be in an unliquidated sum—whatever the services were reasonably worth—and alleges satisfaction thereof by payment of three thousand five hundred dollars accepted in full payment by the plaintiff. This plea of accord and satisfaction required a reply.

With respect to the claim that the cause was tried ⁸⁵⁶ below on the theory that a reply had been filed, we find nothing in the record to sustain such conclusion, and the recital in the judgment that the cause was heard "upon the petition of the plaintiff, the answer of the defendant and the testimony" obviously raises an inference to the contrary. There were five causes of action, as to four of which the answer was a general denial. The mere fact that testimony was taken and a trial had, of itself, would not indicate more than that the cause was tried upon the matters properly triable—namely, the four last causes of action. There is no bill of exceptions from which this court may know what was in fact tried, and while we might have suspected that the issue tendered in the answer was tried, by reason of the amount of the judgment, the fact that the record recites a trial on petition and answer only, indicating either that no reply was deemed necessary, or that the cause was tried on the four last causes of action, precludes such an inference. In *Stewart v. American Exchange Nat. Bank*, 54 Neb. 461, 74 N. W. 865, it was held substantially that to bring a case within the rule that no advantage may be taken in this court of failure to reply below, where trial was had on the theory that a reply had been filed, there must be something in the record from which an inference may be drawn that reply was waived or from which this court may ascertain what issues were actually tried. We fail to see any distinction between this case and that, and must hold that the answer as to the first cause of action stood admitted, and that the pleadings and the finding for the plaintiff "on the issues" do not support the judgment rendered: *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. 314; *Harlan County v. Hogsett*, 60 Neb. 362, 83 N. W. 171.

It is contended, however, that the motion for a new trial was not filed at the proper time, and hence that errors in the judgment are not reviewable. The cause was tried to the court without a jury. The findings of the court are dated April 3, 1897, but the judgment, including the findings, appears on the journal of April 10, ⁸⁵⁷ 1897. The motion for a new trial was filed on April 6th, and counsel argue that it is of no effect because it appears to have been filed four days prior to entry of the judgment. The record shows that it was on file at the time the judgment was entered, and that after entry of the judgment it was called up and ruled on. This might well be thought sufficient. But we do not feel bound

to decide as to the effect of premature filing of such a motion. As the findings of the court are dated April 3d, and the order overruling the motion for a new trial was rendered April 10th, it is pretty clear that the clerk withheld the entry of the findings and judgment until the motion for a new trial had been passed on. The record ought to be so construed as to give effect to all the recitals therein, and in no other way can the two dates which appear in connection with this judgment be reconciled. In such case, the motion was seasonable, since the code (section 316) requires it to be filed within three days after the verdict or decision was "rendered." There is a clear and well-established distinction between rendition and entry of a judgment: 1 Black on Judgments, sec. 106. The findings of the court were its "verdict or decision" within the meaning of the code, and the motion should have been and was made within three days from the rendition thereof. The date of the entry upon the journal would be presumed to be the date of rendition, but where the record shows these dates to be different, the latter alone is to be considered: *Nebraska Nat. Bank v. Pennock*, 59 Neb. 61, 80 N. W. 255. Moreover, it is very doubtful whether a motion for a new trial was required to raise the point in question. In *Farris v. State*, 46 Neb. 857, 858, 65 N. W. 890, this court held that without a motion for a new trial all the pleadings might be examined for the purpose of ascertaining whether the judgment rendered could be rendered properly on such pleadings: See, also, *Shickle etc. Iron Co. v. Kent*, 34 Neb. 568, 572, 52 N. W. 286; *Hansen v. Kinney*, 46 Neb. 207, 64 N. W. 710; *Holmes v. Lincoln Salt Lake Co.*, 58 Neb. 74, 78 N. W. 379. It is true in *Becker v. Simonds*, 33 Neb. 680, 50 N. W. 1129, the court ruled ⁸⁵⁸ that error in overruling a motion for judgment on the pleadings could not be reviewed unless raised in the motion for a new trial. But it will be noticed that the petition in error did not assign as error that the judgment was contrary to law or not sustained by the pleadings; and error in the ruling on the motion, which alone was assigned, had been waived by going to trial. In *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887, it was held that an objection that the verdict and judgment exceeded the amount prayed in the petition must be raised by motion for a new trial. But this was on the ground that an entire omission to pray for judgment would not have rendered the petition demurrable. A case more in point is *Everett v. Hobleman*, 15 Neb. 376, 19 N. W.

452. There plaintiff in error claimed that he should have had a verdict upon a counterclaim of twenty dollars, there being no reply thereto. The court pointed out that for aught that appeared in the record the jury may have allowed it and reduced the recovery to that extent. This seems to have been the controlling consideration, although the court remarked upon the failure to raise the objection in the motion for a new trial. We think all of these cases may be reconciled with *Farris v. State*, 46 Neb. 857, 65 N. W. 890, and that the error in question is reviewable without regard to the time of filing of the motion for a new trial.

For the foregoing reasons it is recommended that the order overruling the motion to discharge the attachment and also the judgment in the main case be reversed, and that the cause be remanded with directions to discharge the attachment and grant a new trial of the main case.

Sedgwick and Oldham, CC., concur.

By the Court. For the reasons given in the foregoing opinion the ruling on the motion to discharge the attachment and also the judgment in the main case are reversed and the cause is remanded, with direction to the district court to discharge the attachment and grant a new trial of the main case

An Attachment statute is construed strictly in favor of those against whom it may be employed: *Pullman etc. Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68, 25 South. 697. Judgments depending for their validity on attachments are considered in the monographic note to *Miller v. White*, 76 Am. St. Rep. 800-805. Irregularities and defects avoiding attachments are considered in the monographic note to *Fridenberg v. Pierson*, 79 Am. Dec. 164-174.

Attesting Witnesses.—A statutory requirement that an instrument of conveyance shall be subscribed by two witnesses is imperative: *Meighen v. Strong*, 6 Minn. 177, 80 Am. Dec. 441. And if two witnesses are required to a chattel mortgage, the filing of such mortgage witnessed only by the mortgagee and one other person does not give constructive notice of its existence: *Donovan v. St. Anthony etc. Elevator Co.*, 8 N. Dak. 585, 73 Am. St. Rep. 779, 80 N. W. 772.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WELLSTON COAL COMPANY v. SMITH.

[65 Ohio St. 70, 61 N. E. 143.]

MINING CORPORATIONS.—A MINING BOSS IS NOT A FELLOW-SERVANT WITH THE MINERS EMPLOYED BY HIM; he stands for and in the place of his master, who is responsible for his acts and omissions. (p. 549.)

MINING CORPORATIONS—MINING BOSS.—A MINER PERFORMING THE DUTIES OF A MINING BOSS BY HIS DIRECTION is not a fellow-servant with other miners, though he is such a fellow-servant when not performing such duties. (p. 549.)

MASTER AND SERVANT—DELEGATION OF DUTIES.—A mining boss cannot delegate his duties to a miner in his employ, so as to relieve his employer from responsibility for negligence in the discharge of the duties of a mining boss, whether such negligence arises from the acts or omissions of the mining boss or of some miner under his employ and by him directed to perform the duties of such boss. (p. 549.)

MASTER AND SERVANT—SAFE PLACE IN WHICH TO WORK, DELEGATION OF DUTY TO KEEP.—If a place of entry is furnished to miners by an employing corporation, it is its duty, through its mining boss, to use ordinary care to keep such place in a reasonably safe condition for the miners passing in, through, out, and along the same; and this duty cannot be shifted by such boss to another employé so as to relieve the corporation from liability for his negligence in performing such duties of the mining boss. (p. 549.)

MASTER AND SERVANT.—IGNORANCE OF A MASTER OR HIS MINING BOSS that an entry in a mine was in an unsafe or dangerous condition does not relieve the master from liability to an injured employé, if such condition would have been known if he had used ordinary care and diligence in the performance of his duties. (p. 552.)

MASTER AND SERVANT—NOTICE, WHAT IMPUTED TO THE MASTER.—If an assistant of a mining boss, in the performance of his duties in looking for the safety of the roof of an

entry, obtains knowledge of its condition, this knowledge, though not reported to such boss, nor to the master, binds the latter. (p. 552.)

MASTER AND SERVANT—EVIDENCE OF NEGLIGENCE OF A MINING BOSS—CROSS-EXAMINATION.—If it appears from the testimony of a witness that he performed certain duties of a mining boss with respect to inspecting and keeping in repair the roof of an entry, and he declares that he had no knowledge of a defect from which an injury to an employé occurs, it is error, on cross-examination, to exclude the question as to whether, if at all, he inspected, by the use of ordinary means for that purpose, the entry at the point where the injury was suffered. (p. 552.)

NEGLIGENCE, CONTRIBUTORY, SLIGHTEST DEGREE OF.—In an action by a miner to recover for injuries suffered from the fall of slate from the roof of an entry, it is error to instruct the jury that if he had used a greater quantity of powder than a reasonably prudent miner would use under the circumstances, and thereby in the slightest degree contributed to such fall, he cannot recover. (pp. 552, 553.)

MASTER AND SERVANT—SERVANT CANNOT RECOVER UNLESS WITHOUT FAULT.—A charge that if the master knew of the dangerous condition of a roof, or could have known of it if he or his agents had exercised due care, and if such condition was unknown to an employé injured thereby, and that he had not equal means with his employer of knowing it, then he can recover for such injury, is erroneous, because it omits the limitation that such employé must himself have been without fault. (p. 553.)

JURY TRIAL — INSTRUCTIONS. — AN ADDITIONAL CHARGE MAY BE REFUSED, even if correct, if a general charge covers the same subject. (p. 554.)

MASTER AND SERVANT—NOTICE TO MASTER.—Notice to the servants and agents who had control of an entry in a mine and cared for and inspected it, is notice to a mining boss and to his principal, irrespective of the grade or rank of such servants or agents. (p. 554.)

A SERVANT IS CHARGED WITH NOTICE of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire. (p. 552.)

MASTER AND SERVANT—NOTICE TO SERVANT.—A SERVANT IS NOT CHARGEABLE with notice of the defective or unsafe condition of the place in which he works merely because he had means and opportunity of ascertaining it, because he has the right to rely on his master's performing his duty to furnish a safe place, and is not required to test and inspect such place. (p. 552.)

Action by Frank Smith against the coal company to recover for injuries received on November 6, 1896, while employed by it and at work in its mine. After charging some holes with powder, he lighted a fuse and ran about sixty feet to an entry, for the purpose of being in a place of safety. On or about the time the blast exploded, the roof of this entry fell upon and seriously injured him. He claimed that the roof of the entry had been out of repair and dangerous for sev-

eral months before the accident, that this condition was known to the corporation and its agents, or could have been known to it and them by the exercise of ordinary care, but was not known to him, and could not have been so known by the exercise of such care. At the trial it was admitted "that at and before the date of the injury to said Smith, defendant had in its employ at all times a sufficient number of careful and competent persons, whose duty it was to look after the safety of all entries in its mine, including the entry in which plaintiff was injured." Verdict for the defendant. Plaintiff moved for a new trial, which was denied by the trial court. On appeal to the circuit court, it reversed the judgment for error: 1. In refusing to admit the evidence of Robert Pope on cross-examination; 2. In the use of the words "slightest degree" in the charge to the jury; 3. In refusing the fourth special charge requested by the plaintiff; and 4. In giving special charges numbered 8, 10, 12, and 2a. The defendant filed its petition in error seeking to reverse the judgment of the circuit court.

J. M. McGillivray, for the plaintiff in error.

Powell & Eubanks and C. C. McCormick, for the defendant in error.

74 BURKET, J. The coal company operated its mine by means of a mine boss, who had authority to hire and discharge employes. In the operation of a coal mine such a mine boss stands for and in place of the company, and his acts and omissions in the operation of the mine are the acts and omissions of the corporation. He is not a fellow-servant with the miners employed by him, and if he directs one of the miners under his employ to perform some of the duties of the mine boss, such miner, while so performing such duties, is not the fellow-servant of the other miners, but while not so performing the duties of the mine boss he would be such fellow-servant. The mine boss cannot delegate his duties to a miner under his employ, so as to relieve the company from responsibility for negligence in the discharge of the duties of the mine boss, whether such negligence arises from the acts or omissions of the mine boss, or of some miner under his employ, and by him directed to perform the duties of such boss.

75 The entry in which Mr. Smith was injured was not a room that he was required to keep in a safe condition himself,

as was the case in *Coal etc. Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610; but, on the contrary, the entry was a place furnished to the miners by the company, through its mine boss, and the duty devolved upon the mine boss to use ordinary care in making and keeping the entry in a reasonably safe condition for the protection of miners passing in and out through and along the same; and this duty could not be shifted by the mine boss to one of his employés, so as to relieve the company from liability for the negligence of such employé while in the performance of the duties of the mine boss as to keeping such entry in a safe condition. The principle as to inspectors, as in *Railroad Co. v. Webb*, 12 Ohio St. 475, are not applicable to the relations existing between a mine boss and his employés, because the miners are completely under his control, and their safety depends upon his vigilance and the proper discharge of his duties.

Our statutes on the subject of mining, section 6871 of the Revised Statutes, indicate a public policy to the effect that mine owners shall be charged with the duty of making their mines reasonably safe for miners; and miners themselves are also required in certain cases to look out for their own safety, as in propping the roofs of the rooms in which they work, the duty of furnishing the timbers being cast upon the company; but there is no provision requiring the miners to prop or look after the safety of entries; that duty rests, therefore, on the owners of the mines.

The case of *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576, 17 N. W. 775, is cited by counsel for plaintiff in error to sustain his contention. In that case there was a pit boss, who had no authority to hire or discharge employés, that power being vested in a superintendent. The pit boss discovered ⁷⁶ that the roof of the mine was unsafe, and it was the duty of the road men to put it in proper and safe condition, and two of them undertook to do so, and while so doing one of them was injured by the negligence of the other. The road men were not performing the duties of the pit boss or superintendent; but, on the contrary, were performing their own duties, and were clearly fellow-servants, and of course one could not recover against the company for an injury caused by the negligence of his fellow-servant.

There are many cases in which it has been held that duties of officers and agents cannot be delegated so as to relieve the principal from liability, and among them are the following:

Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285; Capper v. Louisville etc. Ry. Co., 103 Ind. 305, 2 N. E. 719; Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020; Flike v. Boston etc. R. R. Co., 53 N. Y. 549, 13 Am. Rep. 545; Wooden v. Western New York etc. Ry. Co., 43 N. Y. St. Rep. 218, 16 N. Y. Supp. 840; Fuller v. Jewett, 80 N. Y. 46, 36 Am. Rep. 575; Knahtla v. Oregon etc. Ry. Co., 21 Or. 136, 27 Pac. 91; Brabbitts v. Chicago etc. Ry. Co., 38 Wis. 289; Pike v. Chicago etc. Ry. Co., 41 Fed. 95; Stockmeyer v. Reed, 55 Fed. 259; Madden v. Chesapeake etc. Ry. Co., 28 W. Va. 610, 57 Am. Rep. 695; Lewis v. St. Louis etc. R. R. Co., 59 Mo. 495, 21 Am. Rep. 385; Colorado etc. Ry. Co. v. Naylor, 17 Colo. 501, 31 Am. St. Rep. 335, 30 Pac. 249; Elledge v. National City etc. Ry. Co., 100 Cal. 282, 38 Am. St. Rep. 290, 34 Pac. 720; Justice v. Pennsylvania Co., 130 Ind. 321, 30 N. E. 303; Loughlin v. State, 105 N. Y. 159, 11 N. E. 371; Indiana Car Co. v. Parker, 100 Ind. 181; Hannibal etc. Ry. Co. v. Fox, 31 Kan. 586, 3 Pac. 320; Atchison etc. R. R. Co. v. McKee, 37 Kan. 592, 15 77 Pac. 484; Daves v. Southern Pac. Co., 98 Cal. 19, 35 Am. St. Rep. 133, 32 Pac. 708; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Fisher v. Oregon etc. Ry. Co., 22 Or. 533, 30 Pac. 425; Brown v. Minneapolis etc. Ry. Co., 31 Minn. 553, 18 N. W. 834; Mobile etc. Ry. Co. v. Smith, 59 Ala. 245; Miller v. Southern Pac. R. R. Co., 20 Or. 285, 26 Pac. 70; Moon v. Richmond etc. Ry. Co., 78 Va. 745, 49 Am. Rep. 401; Baltimore etc. R. R. Co. v. McKenzie, 81 Va. 71.

Plaintiff in error urges that it was entitled to a peremptory instruction for a verdict in its favor in view of the admission on the trial: "That at and before the date of the injury to said Smith, defendant had in its employ, at all times, a sufficient number of careful and competent persons whose duty it was to look after the safety of all entries in its mine, including the entry in which plaintiff was injured," and in view of the further fact, as it claims, that there was no statement of any evidence tending to prove knowledge of the defect on the part of the superintendent or mine boss, nor that the defect was open obvious, apparent, and dangerous, or of common knowledge among the employes in the mine, and no other or further evidence concerning it than that of Edward Gordon, who says that he did not consider the matter of sufficient importance to call the attention of the mine boss to it.

A sufficient answer to this claim may be found in the fact that the record fails to show that any such instruction was asked by the plaintiff in error, or refused by the court. Again assuming that the above admission concedes that the mine boss and the track-layer, Edward Gordon, who had the duty enjoined upon ⁷⁸ him, in addition to his duty as track-layer, to inspect and keep in repair the entry in question, were careful and competent persons, whose duty it was to look after the safety of said entry, yet it may be that they were negligent in the performance of their said duty of looking after the safety of said entry. The evidence tended to prove that the mine boss was not observed by anyone testing the roof of that entry for three months before the accident. It urged that there is no evidence tending to prove that he knew the unsafe condition of the entry, but his want of inspection for three months while blasts of powder in the adjoining room were of frequent, if not daily, occurrence, tended to show that he ought to have known its unsafe condition. "Masters are charged with notice, not only of what they know, but also of what they ought to know—that is, of every fact which they would have known had they used ordinary care and diligence in performing their duties": Shearman and Redfield on Negligence, sec. 206.

Again, the evidence tended to show that this Edward Gordon, while assisting the mine boss in the performance of his duty of looking after the safety of the roof of this entry, discovered that it was unsafe, but he did not report it to the boss because he did not consider it very dangerous, and did not think it worth while to tell him. This knowledge so obtained by Edward Gordon while performing the duties of the mine boss is the same as if the knowledge had been obtained by the boss himself and binds the company. There was therefore sufficient testimony of knowledge of the unsafe condition of the roof of the entry, and of negligence in not repairing it, to submit to the jury, and the company was not entitled to a direction for the jury to bring in a verdict in its favor.

⁷⁹ Robert Pope was a boss driver, and the mine boss, Thomas Stiff, enjoined upon him, in addition to his duty as such driver, the duty of inspecting and keeping in repair the entry in question, thus performing one of the duties of said mine boss. The defendant company offered Mr. Pope as a witness in its behalf, and the following question was asked and answer given: "Q. What, if any, knowledge at the time

did you have that the slate in the roof of the entry at the point where plaintiff was injured was loose, defective, or liable to fall? A. I had no knowledge whatever."

On cross-examination he was asked the following question by counsel for plaintiff below: "Q. When, if at any time, while you were working under Thomas Stiff as mine boss, did you inspect, by the use of ordinary means used for that purpose, the entry at the point where plaintiff was injured, or elsewhere in said entry?"

Objection being made to this question by counsel for the company, the objection was sustained and an exception taken. The circuit court held this ruling to be error. While we do not regard this as of much importance, we think that the holding of the circuit court was right. The answer would tend to show whether or not Mr. Pope had used sufficient diligence in the performance of the duties of the mine boss.

The court charged the jury as follows: "I instruct you that the plaintiff in his work had the right to assume that the roof where the slate is alleged to have fallen was in a reasonably safe condition. If the plaintiff, acting upon this assumption, used a greater quantity of powder in shooting the coal than a reasonably prudent miner, under the same conditions and circumstances, would have used, and ^{so} said charge or shot produced a concussion that in the slightest degree contributed to produce the alleged fall of slate, he cannot recover in this case, because such act would constitute negligence upon his part."

The circuit court held this part of the charge erroneous, by reason of the words "in the slightest degree." This holding of the circuit court was in accordance with the holding of this court in *Schweinfurth v. Cleveland etc. Ry. Co.*, 60 Ohio St. 215, 54 N. E. 89, and was right.

The fourth special charge requested by the plaintiff below and refused by the court, and which refusal the circuit court held to be error, is as follows: "If you find from the evidence that the roof of the entry at the place mentioned had become out of repair and dangerous, and that its condition was known to the defendant, or that the same could have been known to said defendant, its servants and agents, who had charge and control of said entry, in time to have prevented said injury complained of, by the exercise of reasonable care, prudence, and caution, and if you should further find that the condition of said roof was unknown to plaintiff, and that

he had not equal means with the defendant of knowing of the unsafe and dangerous condition of said roof, and you should further find that while he, the plaintiff, was passing through and along said entry, a piece of slate, which had become loose, fell upon and injured him, then your verdict must be for the plaintiff."

This request is too broad, as it allows the plaintiff below to recover even though he was at fault himself. The limitation that if he was without fault on his part should have been incorporated into the request to make it sound law. True, this limitation is found in the general charge, but that cannot have the legal effect of making this request sound, so as to constitute its refusal reversible error. To make the ⁸¹ refusal of a request to charge reversible error, the request must be sound law throughout and lacking no required limitation.

Again, the general charge fully and carefully covers the phase of the case included in this request, and incorporates the limitation as to the plaintiff being without fault, and the proposition having been correctly given in the general charge, there was no error in refusing a special charge on the same subject, even if correct.

Knowledge of the unsafe condition of the roof of the entry on part of the servants and agents who had charge and control of the entry would be notice to the company, whether such servants and agents were or were not the superiors of the plaintiff and in authority over him in other matters. In that regard the request was not defective, but for the reasons above given the reversal, founded upon the refusal of the request, is not approved by this court. The second request of plaintiff should have been given without modification, because notice to the servants and agents who had control of the entry, and cared for and inspected it, was notice to the mine boss and company, and whether they were "superior to plaintiff and in authority over him" or not in other matters could make no difference.

The court charged the eighth special request of the defendant below as follows: "If you find from the evidence that plaintiff, at the time of and before his injury, knew that the roof of said entry was unsafe, or had the means and opportunity to ascertain its defective condition, and did not avail himself of such opportunity, or use the means at hand, then he was guilty of such negligence as will prevent his recovering in

this action for any injury ⁸² he may have received, and your verdict must be for the defendant."

The circuit court held this to be error, and we concur in that holding. If the plaintiff below knew the roof of the entry to be unsafe, and entered notwithstanding such knowledge, he was negligent and ought not to recover; but as it was the duty of the mine boss to furnish a reasonably safe entry, and to keep it in a reasonably safe condition, the miners could rely upon that duty being performed, and were not required to test and inspect the roof of the entry themselves, and were not charged with knowledge of its unsafe condition, further than the knowledge they would ordinarily obtain in the proper discharge of the work they were employed to perform. The law is stated thus by Shearman and Redfield on Negligence, section 217: "A servant is chargeable with actual notice of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire."

A miner is required by section 6871 of the Revised Statutes to prop the room in which he works and keep it in a safe condition, and therefore he must use the means at hand to ascertain its safety before entering, but no such duty is enjoined upon him as to an entry. The court also erred in giving the seventh special charge asked by defendant, in so far as regards the means and opportunity of plaintiff to ascertain the condition of the roof of the entry.

Special charge No. 10, given at request of defendant below, is as follows: "That if you find from the evidence that the fall of slate upon plaintiff was caused by the jar or concussion from the shot fired by plaintiff in an adjacent room, and that such slate fall did not extend into the ⁸³ middle of the entry, where drivers, miners, and other employés walked while going to and from their work, then your verdict must be for the defendant, for the reason that the plaintiff was not injured at a point or place where defendant had any reason to expect that any of its employés would pass."

The giving of this charge the circuit court held to be error, and we think rightly. It was the duty of the company to keep the roof of the whole entry in a reasonably safe condition. Miners passing in and out would often meet cars, and would be compelled to turn aside, and they had a right to be protected while doing so. On the occasion of the injury in question there was a car on the track, which compelled

plaintiff below to take to the side of the entry, and while so doing he had a right to be reasonably protected, and the company should have anticipated such occurrences.

The seventeenth special charge is in substance the same as the tenth, and is open to the same objection.

The twelfth special charge on behalf of defendant below is as follows: "If you find from the evidence that the fall of slate which injured plaintiff was simultaneous with the explosion of the shot by him fired in an adjacent room, or very shortly thereafter, it is your duty to inquire whether the said slate would have fallen at said time but for the concussion of said shot, and if you find that the said shot was excessively large, then your verdict must be for the defendant."

The circuit court properly held the giving of this to be error. Under this charge the jury might find that the slate would have fallen at the time it did without the concussion of the shot, and yet if they should find that the shot was excessively large, even ⁸⁴ though it did not cause the slate to fall, they must bring in a verdict for the defendant.

If the shot was excessive, and not such as was ordinarily used, and caused the slate to fall, the roof being in a reasonably safe condition, the plaintiff caused his own injury, and should not recover. And if the shot was not excessive, and was such as is ordinarily used, and still caused the slate to fall, the roof being in a reasonably safe condition, the falling of the slate was what is known as an inevitable accident, for which there could be no recovery, and a charge along those lines would be proper, but the special charge as given was error.

Special charge No. 2a, given at the request of defendant below, is as follows: "If you find from the evidence that there was a fall of slate in front of the room in which Smith worked some time prior to the date of alleged injury, which was cleaned up by defendant's employes who were competent for the purpose, and who, at said time, put the roof of said entry at said point in such condition that they considered it reasonably safe, then plaintiff cannot recover in this action, even though you should find that said work was not properly done, or said roof made reasonably safe, and the defendant could not, in the exercise of ordinary care, have known that it was improperly done."

The circuit court held this to be error, in which holding we concur. The fall of slate in front of Smith's room was some four months before the accident, and not at the place in the

entry where the slate fell upon Mr. Smith, and what was done at that place could not rule the law as to the place in the entry where Smith was injured.

It seems that the circuit court was of opinion that Edward Gordon and Robert Pope, upon whom was enjoined ⁸⁵ the duty of performing the duties of the mine boss as to looking after the safety of the roof of said entry, in addition to their other duties, were, while so performing the duties of the mine boss, the fellow-servants of plaintiff below and the other miners, and therefore held several charges good which were clearly erroneous, among them being special charge 1a, which was, in effect, that knowledge on the part of Gordon of the defect in the roof of the entry could not charge the defendant with notice of such defective condition, either actual or constructive.

Upon a retrial of the case, the charge, and especially that part covered by the request of defendant, should be recast so as to conform as near as may be to this opinion.

The judgment of the circuit court is affirmed.

Minshall, C. J., and Williams and Spear, JJ., concurred.

Davis and Shauck, JJ., dissented.

DUTY OF MINE OWNERS TO PREVENT INJURY TO THEIR EMPLOYEES.*

I. In General.

- a. Duty to Provide Safe Place.
- b. Duty to Provide Safe Machinery and Appliances.
- c. Duty to Provide Competent Employe's.

II. Degree of Care Required of Mine Owner.

- a. General Rule—Reasonable Care Only.
- b. What Constitutes Reasonable Care.
 1. In General—Question of Fact.
 2. Effect of Fact of Injury Upon Question of Negligence.
 3. In Providing Safe Place.
 - A. Timbering.

*REFERENCES TO MONOGRAPHIC NOTES.

Duty of employer to furnish employe's with safe means and appliances with which to work and generally provide for their safety: 92 Am. Dec. 213-221; 77 Am. Dec. 218-225.

Liability of master to servant for injury to latter caused by fellow-servant: 88 Am. Dec. 279-290.

Who are fellow-servants: 67 Am. Dec. 588-597.

Who is a vice-principal: 75 Am. St. Rep. 584-640—Mining bosses, employe's and foremen, at p. 626.

Duty of master to provide safe place: 21 Am. Rep. 579-582.

Protection of corporations from special and hostile legislation—Special statutes respecting employe's: 62 Am. St. Rep. 165-182, at p. 176.

- B. Ventilation.
- C. Inspection
- D. Where Life of Employé is Endangered by
Emergency.
- E. Where Employé is Making His Own Place.
- F. Where Employé is Repairing Dangerous
Place.
- G. In Completed and Opened Portions of the
Mine.

- 4. In Providing Safe Appliances.
 - A. Need not Secure Best Obtainable.
 - B. Use of Similar Machinery in Other Mines.
 - C. Effect of Long-continued Use of Appliance
on Question of Negligence.
- 5. In Providing Competent Employees.
 - A. Employment of Minors.
 - B. Duty to Investigate Competence.
- 6. In Prescribing Rules.

III. Right of Mine Owner to Delegate Responsibility.

IV. Right of Mine Owner to Contract Against Liability for Negligence.

V. Assumption of Risks by Employés in Mines.

- a. General Rule.
- b. Risks Ordinarily Incident to Mining.
 - 1. In General.
 - 2. Negligence of Fellow-servants.
 - A. General Rule.
 - B. Who are Fellow-servants in Mines.
 - C. Where Negligence of Fellow-servant and of
Mine Owner Contributes to the Injury.
- c. Risks not Ordinarily Incident to Mining.
 - 1. General Rule.
 - 2. Duty of Mine Owner to Warn Concerning.
 - A. In General.
 - B. Minors, Inexperienced Employees, etc.
 - 3. Negligence of Mine Owner.
 - A. General Rule—Not Risk Assumed.
 - B. Where Employé Knows or Should Know of
Defect.
 - C. Where Mine Owner Promises to Remedy
Defect.
 - D. Where Reasonable Time has Elapsed After
Promise to Remedy.
 - E. Where Danger is Immediate.
 - 4. Where Employé is Under Direct Superintendence of Mine Owner or Foreman.
- d. Where Service is Involuntary.
- e. Knowledge of Both Defect and Danger Essential.

VI. Statutory Regulations.**a. In General.**

1. Nature and Constitutionality of.
2. Effect of Upon Liability of Mine Owner at Common Law for Negligence.
3. Effect of Violation of.
4. Contributory Negligence of Employe as Defense to Action for Violation of.
5. Violation must be Proximate Cause of Injury.
6. Meaning of "Willful" in Statutes of this Nature.

b. Various Provisions of.

1. Props and Timbering.
2. Ventilation.
3. Escapement Shafts.
4. Hoisting Machinery.
5. "Mine Boss."
 - A. Liability of Mine Owner for Negligence of.
 - B. Effect of Certificate of Competence.
6. Inspection.
7. Miscellaneous.

I. In General.

a. **Duty to Provide Safe Place.**—There is, in the entire body of law devoted to the relation of master and servant, no principle more firmly established than that which demands of the master the exercise of all reasonable care to provide his servant with a safe place in which to perform the work required of him. The necessity of this rule and the importance of the duty it imposes is in every case apparent, but in no connection more so than when applied to the relation existing between a mine owner and his employes. The peculiarly hazardous conditions under which the work must necessarily be prosecuted make it of the first importance that the employer be required to use all reasonable means to provide a safe place for its performance, and the principle is established by almost innumerable authorities that it is the duty of a mine owner to use all reasonable care and diligence to furnish his employes with a safe place for the performance of their duties: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 South. 455; *Beeson v. Green Mountain etc. Min. Co.*, 57 Cal. 20; *New York etc. Mining Syndicate v. Rogers*, 11 Colo. 6, 16 Pac. 719; *Mollie Gibson etc. Min. Co. v. Sharp*, 5 Colo. App. 321, 38 Pac. 850; *Consolidated Coal Co. v. Yung*, 24 Ill. App. 255; *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Island Coal Co. v. Greenwood*, 151 Ind. 476, 50 N. E. 36; *Choctaw etc. Ry. Co. v. Nicholas* (Ind. Ter.), 53 S. W. 475; *Forbes v. Boone Valley Coal Co.* (Iowa, Jan., 1901), 84 N. W. 970; *Cherokee etc. M. Co. v. Britton*, 3 Kan. App. 292, 45 Pac. 100; *Godfrey v. Coal Co.*, 101 Ky. 339, 41 S. W. 10; *Ashland Coal etc.*

Co. v. Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; Kaltinsky v. Wood (Ky., Dec., 1901), 65 S. W. 848; Burgess v. Davis Sulphur Ore Co., 165 Mass. 71, 42 N. E. 501; Andrews v. Tamarack Min. Co., 114 Mich. 375, 72 N. W. 242; Hamman v. Central Coal Co., 156 Mo. 232, 56 S. W. 1091; De Weese v. Meramec Iron M. Co., 128 Mo. 423, 31 S. W. 110; Monahan v. Kansas City etc. Co., 58 Mo. App. 68; Kelley v. Fourth of July Min. Co., 16 Mont. 484, 41 Pac. 273; Comben v. Belleville Stone Co., 59 N. J. L. 226, 36 Atl. 473; Pantzar v. Tilly Foster Iron Min. Co., 99 N. Y. 368, 2 N. E. 24; Wellston Coal Co. v. Smith (principal case), 65 Ohio St. 70, 61 N. E. 143; Johnson v. Portland Stone Co. (Or., Mar., 1902), 67 Pac. 1013; Knoxville Iron Co. v. Pace, 101 Tenn. 476, 48 S. W. 232; Trihay v. Brooklyn Lead Min. Co., 4 Utah, 468, 11 Pac. 612; Linderberg v. Crescent Min. Co., 9 Utah, 163, 33 Pac. 692; Robinson v. Dininny, 96 Va. 41, 30 S. E. 442; Shannon v. Consolidated etc. Min. Co., 24 Wash. 119, 64 Pac. 169; Costa v. Pacific Coast. Co. (Wash., Sept., 1901), 66 Pac. 398; McMahon v. Ida Min. Co., 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; Union Pac. Ry. Co. v. Jarvi, 53 Fed. 65, 10 U. S. App. 439; Western Coal Co. v. Ingraham, 70 Fed. 219, 17 C. C. A. 71; Bunker Hill etc. Min. Co. v. Schmelling, 79 Fed. 263, 24 C. C. A. 564; Westland v. Gold Coin Mines Co., 101 Fed. 59, 41 C. C. A. 193; Sommer v. Carbon Hill Coal Co., 89 Fed. 54, 32 C. C. A. 156; Mather v. Rillston, 156 U. S. 391, 15 Sup. Ct. Rep. 464; Deserant v. Cerillos Coal Ry. Co., 178 U. S. 409, 20 Sup. Ct. Rep. 967; Patterson v. Wallace, 1 Macq. 748. Nor does the owner of a mine discharge this duty by merely using reasonable care to originally render the premises safe. His duty is a continuing one, and requires of him the same degree of diligence and care to maintain it in a condition reasonably free from danger to his employes: See cases above cited, and Parke County Coal Co. v. Barth, 5 Ind. App. 159, 31 N. E. 585; Faulkner v. Mammoth Min. Co. (Utah), 66 Pac. 799; Union Pac. Ry. Co. v. Jarvi, 53 Fed. 65.

b. Duty to Provide Safe Machinery and Appliances.—Equally well settled is the principle (applicable with the same force to all cases where the relation of master and servant exists) that the mine owner is bound to use due diligence to supply his employes and equip his premises with machinery and appliances reasonably safe, and must use reasonable care to preserve these appliances in proper condition. He owes his employes the duty of taking all reasonable precautions and of employing all reasonable care and diligence to properly equip and to keep in repair the appliances used by such employes in the performance of their labor: Eureka Co. v. Bass, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; Wells v. Coe, 9 Colo. 159, 11 Pac. 50; Consolidated Coal Co. v. Bonner, 43 Ill. App. 7; Parke County Coal Co. v. Barth, 5 Ind. App. 159, 31 N. E. 585; Indiana Bituminous Coal Co. v. Buffey (Ind. App.), 62 N. E. 279; Forbes v. Boone Valley Coal etc. Co. (Iowa, Jan., 1901), 84 N. W. 970; Myers v. Hudson Iron Co., 150 Mass. 125, 15 Am. St. Rep.

176, 22 N. E. 631; *Turner v. St. Clair Tunnel Co.*, 121 Mich. 616, 80 N. W. 720; *Patnode v. Harker*, 20 Nev. 303, 21 Pac. 679; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535; *Belleville Stone Co. v. Comben*, 61 N. J. L. 353, 39 Atl. 641; *Jarvis v. Northern New York Marble Co.*, 55 App. Div. 272, 67 N. Y. Supp. 78; *Spelman v. Fisher Iron Co.*, 56 Barb. 15; *Chicago etc. Coal etc. Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Mangum v. Bullion Beck etc. Min. Co.*, 15 Utah, 534, 50 Pac. 834; *Tennessee Coal Iron etc. Co. v. Currier*, 108 Fed. 19; *Barton's Hill Coal Co. v. Reid*, 3 Macq. 266.

c. Duty to Provide Competent Employés.—The duty of a mine owner with respect to the selection and retention of his employés is that owed by every master to his servants. He must use all reasonable care and diligence to employ and to retain in his service none but competent employés, and his duty in this regard is quite as positive as is that of supplying safe places and machinery. In mining, perhaps, to a greater extent than in any other business, the safety of each employé is dependent upon the competence and care taken by those with whom he is compelled to labor, and it is well settled that the reasonable care required of the master to prevent injury to his employés requires that he select and retain only such coservants as are reasonably competent to discharge the duties required of them: *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255; *Stephens v. Doe*, 73 Cal. 26, 14 Pac. 378; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596; *Niantic Coal etc. Co. v. Leonard*, 25 Ill. App. 95; *Oleson v. Maple Grove Coal etc. Min. Co.* (Iowa, Oct., 1901), 87 N. W. 736; *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Walkowski v. Penakee etc. Con. Mines*, 115 Mich. 629, 73 N. W. 895; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535; *Cerrillos Coal Co. v. Deserant*, 9 N. Mex. 49, 49 Pac. 807; *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368, 2 N. E. 24; *Redstone Coke Co. v. Roby*, 115 Pa. St. 364, 8 Atl. 593; *Handley v. Daly Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; *McCharles v. Horn Silver Min. Co.*, 10 Utah, 470, 37 Pac. 733; *Carlson v. Wilkeson Coal etc. Co.*, 19 Wash. 473, 53 Pac. 725; *Hughes v. Oregon Improvement Co.*, 20 Wash. 294, 55 Pac. 119; *Weeks v. Scharer*, 111 Fed. 330; *Barton's Hill Coal Co. v. Reid*, 3 Macq. 266.

II. Degree of Care Required of Mine Owner.

a. General Rule—Reasonable Care Only.—The mine owner is not, however, an insurer of the safety of his employés. He does not guarantee the safety of his premises, the condition or fitness of his appliances, nor the competence of those whom he employs as his servants. He is bound to the exercise of reasonable care and diligence, but need go no further. Extraordinary care in the discharge of his duties is not required, and he does all that the law demands when he exercises that degree of care, diligence, and

foresight that a reasonably intelligent and prudent man would employ to prevent injury to his employes. Having done this much, he cannot be held for injuries arising from causes purely accidental or which no reasonably necessary precautions could have averted: *Wells v. Coe*, 9 Colo. 159; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9, 54 N. E. 567; *Consolidated Coal Co. v. Scheeler*, 42 Ill. App. 619; *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Choctaw etc. R. Co. v. Nicholas (Ind. Ter.)*, 53 S. W. 475; *Corson v. Coal Hill Coal Co.*, 101 Iowa, 224, 70 N. W. 185; *Blazenic v. Iowa etc. Coal Co.*, 102 Iowa, 706, 72 N. W. 292; *Cherokee etc. Min. Co. v. Britton*, 3 Kan. App. 292, 45 Pac. 100; *Ashland Coal etc. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535; *Cerrillos Coal Co. v. Deserant*, 9 N. Mex. 49, 49 Pac. 807; *Sharpsteen v. Livonia etc. Min. Co.*, 38 N. Y. Supp. 49, 3 App. Div. 144; *Chicago etc. Coal etc. Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270, 28 Atl. 1087, 1088; *Johnston v. Youghiogheny River Coal Co.*, 183 Pa. 623, 39 Atl. 10; *Knoxville Iron Co. v. Pace*, 101 Tenn. 476, 48 S. W. 232; *Reddon v. Union Pac. Ry. Co.*, 5 Utah, 344, 15 Pac. 262; *Cook v. Bullion Beck Min. etc. Co.*, 12 Utah, 51, 41 Pac. 557; *Mangum v. Bullion Beck etc. Min. Co.*, 15 Utah, 534, 50 Pac. 834; *South West Virginia Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015; *Sexton v. Turner*, 89 Va. 341, 15 S. E. 862; *Morgan v. Carbon Hill Coal Co.*, 6 Wash. 577, 34 Pac. 152; *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 10 U. S. App. 439; *Portland Gold Min. Co. v. Flaherty*, 111 Fed. 312; *Wilson v. Merry*, L. R. 1 H. L. S. 326.

b. What Constitutes Reasonable Care.

1. **In General—Questions of Fact.**—What amounts to "reasonable care" is a question a satisfactory answer to which is not to be found in any general definition or rigid formula. It differs with each varying state of facts, and what would undoubtedly be reasonable care under one set of circumstances would be the utmost criminal negligence under another. "The care and diligence required of the master," says Judge Sanborn in *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 10 U. S. App. 439, "is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. It must be commensurate with the character of the service required and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. Obviously, a far higher degree of care is demanded of the master who places his servant at work digging coal beneath overhanging masses of rock and earth than of him who places his employé on the surface of the earth, where danger from superincumbent masses is not to be apprehended. A reasonably prudent man would exercise greater care and watchfulness in the former than in the latter case, and throughout all the varied occupations of mankind the greater the danger that a reasonably

prudent man would apprehend, the higher is the degree of care and diligence the law requires of the master in the protection of his servant. For a failure to exercise this care, resulting in the injury of the employé, the employer is liable, and this duty and liability extend, not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended”: See, also, *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Finlayson v. Utica etc. Min. Co.*, 67 Fed. 507, 14 C. C. A. 492; *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464. The rule here laid down is applicable to the degree of care required of the master in selecting and maintaining a safe place and safe appliances is equally pertinent with respect to his duty in the selection and retention of competent employés. “The nature of the service and the dangers attending it should be considered. A closer supervision over the habits, competency and conduct of an engineer is required than over a common laborer, for the obvious reason that the dangerous consequences of neglect are likely to be so much greater in the one case than in the other; the rule being, the greater the danger the greater the care”: *Handley v. Daly Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; *Walkowski v. Consolidated Mines*, 115 Mich. 629, 73 N. W. 895.

2. Effect of Fact of Injury upon Question of Negligence.—From the rule that the mine owner is not an insurer of the safety of his employés, but is liable only when he has failed to exercise the care and diligence required of him as a prudent man under the circumstances, it follows as an immediate corollary that the mere fact that the accident occurred is not of itself and in the absence of other circumstances sufficient to subject him to liability for a resultant injury: *Hughes v. Oregon Improvement Co.*, 20 Wash. 294, 55 Pac. 119; *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999. There are, however, cases where the facts are such that the maxim “*Res ipsa loquitur*” may well be held to apply, and, where the nature and circumstances of the accident are such that it would not ordinarily have occurred had the defendant been in the exercise of due care, a presumption of negligence arises: *Cunningham v. Union Pac. Ry. Co.*, 4 Utah, 206, 7 Pac. 795; *Westland v. Gold Coin Mines Co.*, 101 Fed. 59, 41 C. C. A. 193. The mere failure to take precautions by which the accident might have been avoided is, moreover, not in itself proof of negligence. It must further appear that the dangers were such that a reasonably prudent man would have foreseen and taken measures to guard against them. As is said in *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619: “After an accident has occurred it may be easy to see what would have prevented it; but that of itself does not prove, nor tend to prove, that reasonable or ordinary care would have anticipated and guarded against it.” While, therefore, it is incumbent upon a mine owner in the discharge of his duty of furnishing a “safe place,” to adopt any precautions rea-

sonably necessary to prevent injury to his employé, in but very few instances can it be said, as a matter of law, that the adoption of any particular measure was essential to the performance of this duty. Thus it has been held that in the absence of statute the owner of a mine owes no absolute duty to his employé to adopt even so usual a precaution as the timbering of the interior of the mine; and in the absence of some showing that such timbering was necessary as a measure of reasonable prudence, the failure to employ it is not of itself proof of negligence: *Consolidated Coal Co. v. Yung*, 24 Ill. App. 255; *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619; *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304; *Boemer v. Central Land Co.*, 69 Mo. App. 601. So it is held that it is not possible to say, as a matter of law, that it is the duty of persons operating coal mines to cut a manway (different and separate from the slope through which coal is brought to the surface), for the ingress and egress of their employés: *Whatley v. Coal Co.*, 122 Ala. 118, 26 South. 124.

3. In Providing Safe Place.

A. Timbering.—The entire question is one of negligence. While, therefore, there is no common-law obligation upon the owner of a mine to timber its shafts and galleries, whenever this precaution is reasonably necessary to prevent the fall of rocks, or to support the sides and roof of a passageway or room, it is the duty of the mine owner (see for exceptions, post, pp. 566, 567) to adopt this measure: *Sampson etc. Co. v. Schaad*, 15 Colo. 197, 25 Pac. 89; *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9, 54 N. E. 567; *Island Coal Co. v. Greenwood*, 151 Ind. 476, 50 N. E. 36; *Parke County Coal Co. v. Barth*, 5 Ind. App. 159, 31 N. E. 585; *Hancock v. Keene*, 5 Ind. App. 408, 32 N. E. 329; *Island Coal Co. v. Pisher*, 13 Ind. App. 98, 40 N. E. 158; *Blazenic v. Iowa etc. Coal Co.*, 102 Iowa, 706, 72 N. W. 292; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273; *Linderberg v. Crescent Min. Co.*, 9 Utah, 163, 33 Pac. 692; *Western Coal etc. Min. Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71; *Patterson v. Wallace*, 1 Macq. 748. The timbering must, of course, be adapted to the ordinary incidents of mining and, where blasting is employed, must be sufficient to withstand the shock of explosions: *James v. Emmet Min. Co.*, 55 Mich. 335, 21 N. W. 361. Reasonable care in this connection involves, moreover, the duty of maintaining the supports of the mine in proper condition, and of inspection and repair whenever demanded by ordinary prudence: *Koltinsky v. Wood* (Ky., Dec. 1901), 65 S. W. 848; *Westland v. Gold Coin Mines Co.*, 101 Fed. 59, 41 C. C. A. 193. See, also, *Molly Gibson etc. Min. Co. v. Sharp*, 5 Colo. App. 321, 38 Pac. 850.

B. Ventilation.—Where, as in coal mines, the collection of poisonous and inflammable damps and gases form a source of danger to those employed in mining, reasonable care upon the part of the owner obviously requires that in the operation of such mines ven-

tilation shall be produced sufficient to make them reasonably safe for persons working therein. The owner is liable for all injuries resulting from his failure to take reasonable precautions, whether the cause of injury was one of which he had actual knowledge or was merely such as he might, with the exercise of due care, have discovered. There rests upon him, therefore, the duty of inspecting the mine to ascertain its condition with respect to this danger, and of rendering it reasonably safe for the performance of the labor required of his employes: *Mosgrove v. Zimbleman Coal Co.*, 110 Iowa, 169, 81 N. W. 227; *Godfrey v. Coal Co.*, 101 Ky. 339, 41 S. W. 10; *Lexington etc. Co. v. Stephens*, 20 Ky. Law Rep. 696, 47 S. W. 321; *Cerrillos Coal Co. v. Deserant*, 9 N. Mex. 49, 49 Pac. 807; *Knoxville Iron Co. v. Pace*, 101 Tenn. 476, 48 S. W. 232; *Costa v. Pacific Coast Co.* (Wash., Sept., 1901), 66 Pac. 398; *Deserant v. Cerrillos R. Co.*, 178 U. S. 409, 20 Sup. Ct. Rep. 967.

C. Inspection.—This principle is indeed of general applicability. Due care on the part of the mine owner requires not merely diligence with respect to those defects of which he has notice, but likewise with respect to those of which he might learn by the exercise of due diligence. Where he ought, by reasonable diligence, to have discovered a defect, he is held to have knowledge of it: *Linton Coal Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214; *Jarvis v. Northern New York etc. Co.*, 55 App. Div. 272, 67 N. Y. Supp. 78; *Spelman v. Fisher Iron Co.*, 56 Barb. 151. Notice to the mine owner of a defect may, therefore, well be implied from its existence for such length of time that he would, in the exercise of ordinary diligence, have discovered it: *Blazenic v. Iowa etc. Coal Co.*, 102 Iowa, 706, 72 N. W. 292; *Cushman v. Carbondale Fuel Co.* (Iowa, Jan., 1902), 88 N. W. 817. See, also, *Consolidated Coal Co. v. Scheller*, 42 Ill. App. 619.

D. Where Life of Employé is Endangered by Emergency.—In *Bessemer Land etc. Co. v. Campbell*, 121 Ala. 50, 25 South. 793, the rule as to what constitutes due diligence upon the part of the mine owner, when an employé is placed in a perilous position and his life is endangered, is laid down. In that case a miner was imprisoned by a fire in the mine, and might have lived for some time but for the action of the superintendent of the mine in seeking to smother the fire by closing the openings through which the heat, smoke, and gases were escaping. The court, speaking through *McClellan, C. J.*, uses the following language: "If Reeve's life could have been saved by telegraphing to New York or Chicago for hose with which to flood the fire, it was upon the defendant's superintendent to so telegraph and have the appliances sent by express. And so, if that would have met the occasion, he should have telegraphed to Birmingham, sixty miles away, where such appliances were generally kept, and, if need had been, have had them sent out by a special train. Where human life is at stake the rule of due care and diligence requires everything that gives reasonable promise

of its preservation to be done, regardless of difficulties and expense." This, however, would seem, as a matter of law, to lay down a rule of diligence entirely too rigid and exacting to be deemed "reasonable." and while the degree of diligence and care which a reasonably prudent man would exercise if confronted by a situation imperilling human life is undoubtedly very high, it is doubtful whether it can be said to require the adoption of every measure, "regardless of difficulties and expense." In *Hughes v. Oregon Imp. Co.*, 20 Wash. 294, 55 Pac. 119, under a very similar state of facts, the action of the mine superintendent in shutting down the ventilating fan of a coal mine in which plaintiff's intestate was imprisoned by fire, was held not to be negligence, the court saying: "If what was done was not the best thing that could have been done, it nevertheless cannot be deemed an act of negligence, but it must be considered a mere error of judgment, for which the company cannot be held responsible": See, also, *Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547, 689.

E. Where Employé is Making His Own Place.—This rule that the mine owner is bound to use all reasonable care to render safe the place furnished by him to his employés is applicable only when the place in which the latter are at work is such that it can be said to be a place "furnished" by the mine owner. When, therefore, the employés are engaged in making their own place, the rule does not apply. Where, for instance, miners are engaged in cutting down or blasting out the face of a drift, it would be entirely unreasonable to demand of the owner that immediately after each blast he make safe the place which the explosion has created. In such case the miners may with reason be said to be furnishing their own place. The character of the place is continually changing by reason of the work itself. It is, therefore, uniformly held that as to those places which the employé in the progress of his work furnishes for himself, it is his duty, and not that of his employé, to use reasonable care to render them safe for the further prosecution of the work: *Island Coal Co. v. Greenwood*, 151 Ind. 476, 50 N. E. 36; *Ross v. Union Cement etc. Co.*, 25 Ind. App. 463, 58 N. E. 500; *Taylor v. Star Coal Co.*, 110 Iowa, 40, 81 N. W. 249; *Oleson v. Maple Grove etc. Min. Co.* (Iowa, Oct., 1901), 87 N. W. 736; *Wallquist v. Maple Grove etc. Min. Co.* (Iowa, Feb., 1902), 89 N. W. 98; *Petaja v. Aurora Min. Co.*, 106 Mich. 463, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273; *Sharpsteen v. Livonia etc. Min. Co.*, 38 N. Y. Supp. 49, 3 App. Div. 144; *Consolidated Coal Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610; *Faulkner v. Mammoth Min. Co.* (Utah, Apr., 1901), 66 Pac. 799; *Anderson v. Daly M. Co.*, 16 Utah, 28, 50 Pac. 815; *Mielke v. Chicago etc. Ry.*, 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22; *Finlayson v. Utica etc. Min. Co.*, 67 Fed. 507, 14 C. C. A. 492.

F. Where Employé is Repairing Dangerous Place.—Nor does the rule that the mine owner must provide a reasonably safe place apply to those cases in which the work of the employé is that of making a dangerous place safe. As is said in *Colorado Coal etc. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251: "There is a wide difference between providing a safe place for the servants to work in and putting a place already found to be insecure in condition for the resumption of labor. If it happened to be true that the entry was insufficiently timbered and insecure, according to the judgment of the jury, when the first fall occurred, and nobody had been injured, the master must undoubtedly have had the right to put the place in shape for the resumption of labor. He had the right to put an insecure place into a safe condition. Laborers who were employed to aid in this effort took upon themselves whatever of added risk might have come from the then condition of the entry. It is a most undoubted principle that where a piece of property is out of repair, the men who are employed in making it safe take upon themselves whatever of added risk comes from the existing condition of the place or work." And to the same effect see *Wahlquist v. Maple Grove Coal etc. Co.* (Iowa, Feb., 1902), 89 N. W. 98; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273; *Faulkner v. Mammoth Min. Co.* (Utah, Apr., 1901), 66 Pac. 799; *Finlayson v. Utica etc. Min. Co.*, 67 Fed. 507, 14 C. C. A. 492; *Moon Anchor Consolidated Gold Mines v. Hopkins*, 111 Fed. 298; *Bunt v. Mining Co.*, 138 U. S. 483, 11 Sup. Ct. Rep. 464, affirming 24 Fed. 847.

G. In Completed and Opened Portions of the Mine.—As to the completed portions of a mine, the rule requiring the mine owner to provide a reasonably safe place is undoubtedly applicable. It may frequently be difficult to say, and the law does not fix, exactly at what point of time a certain place in a mine becomes such that the duty of the employé to care for it ceases, and it becomes a place which the mine owner furnishes, and which he must use reasonable care to keep safe: *Taylor v. Star Coal Co.*, 110 Iowa, 40, 81 N. W. 249. But when once it is determined that it is no longer a place which the employé furnishes for himself, the duty of the mine owner attaches. Entries, passageways, etc., are, therefore, places which the employer is bound to render and maintain in safe and proper condition. Over them the employé has no control, and as to them he is entitled to rely upon the mine owner's having done his duty to make and keep them safe: *Howley v. California Bridge etc. Co.*, 127 Cal. 232, 59 Pac. 577; *Brazill Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Island and Coal Co. v. Greenwood*, 151 Ind. 46, 50 N. E. 36; *Parke County v. Barth*, 5 Ind. App. 159, 31 N. E. 585; *Carson v. Coal Hill Coal Co.*, 101 Iowa, 224, 70 N. W. 185; *Blazenic v. Iowa etc. Coal Co.*, 102 Iowa, 706, 72 N. W. 292; *Ashland Coal Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Kelley v. Fourth of July*

Min. Co., 16 Mont. 484, 41 Pac. 273; Wellston Coal Co. v. Smith (principal case), 65 Ohio St. 70, 61 N. E. 143; Union Pac. Ry. Co. v. Jarvi, 53 Fed. 65, 10 U. S. App. 439; Western Coal Min. Co. v. Ingraham, 70 Fed. 219, 17 C. C. A. 71.

4. In Providing Safe Appliances.

A. Need not Secure Best Obtainable.—The duty of a mine owner with respect to supplying his servants with safe machinery and appliances does not, it is well settled, require that he procure the best obtainable. He is bound only to furnish such as are reasonably safe and well adapted to the work for which they are intended: Consolidated Coal Co. v. Bonnie, 43 Ill. App. 17; Reddon v. U. P. Ry. Co., 5 Utah, 344, 15 Pac. 262; Mangum v. Bullion etc. Min. Co., 15 Utah, 534, 50 Pac. 834; Berns v. Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304. In the case of Mather v. Rillston, 156 U. S. 39, 15 Sup. Ct. Rep. 464, the supreme court of the United States lays down the rule that the mine owner is bound to use all appliances "readily attainable, known to science for the prevention of accidents." In that case injury had resulted from the explosion of powder and caps in an iron mine, and the court, speaking through Mr. Justice Field, after discussing at length the duty of mine owners to their employés, uses the following frequently quoted language: "Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable, known to science, for the prevention of accidents, and that the neglect to provide such readily obtainable appliances will be regarded as proof of culpable negligence": See, also, Western etc. Min. Co. v. Berberich, 94 Fed. 329, 36 C. C. A. 364.

B. Use of Similar Machinery in Other Mines.—In determining what amounts to reasonable care in the selection of appliances, the extent to which certain appliances are used in mines similarly situated is important. Thus, a general custom on the part of other mine owners similarly circumstanced to use such appliances as were supplied by the owner of the mine in which an accident has occurred is evidence that the latter was not negligent in the performance of his duty of exercising reasonable care in this connection: Lehigh etc. Coal Co. v. Hayes, 128 Pa. St. 294, 15 Am. St. Rep. 680, 18 Atl. 387; King v. Morgan, 109 Fed. 446, 48 C. C. A. 507. Conversely, it may be shown as proof of a particular mine owner's negligence in this regard that other mines similarly situated employed devices which were safer or better adapted to

the uses to which they were put than those used by him for the same purpose: *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631.

C. Effect of Long-continued Use of Appliance on Question of Negligence.—In the case last cited it is held that it does not follow from the fact that a machine, not obviously dangerous, had been in use for a long time, and had uniformly proved safe and satisfactory, that its use may be continued without imputation of negligence. Such evidence is entitled to weight, but does not conclusively show due care, and in this connection it was held in *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501, that it was incompetent for a mine owner to show due care by evidence that no accident had ever before happened in the mine, the court saying: "There were too many uncertain and undetermined elements which might affect the safety of its workmen to make the testimony valuable or proper."

5. In Providing Competent Employés.

A. Employment of Minors.—A mine owner is, as we have seen (*supra*, p. 561), no insurer of the competency of those whom he employs, but is bound only to reasonable care to select and retain those competent to perform the duties required of them. What is reasonable care in the performance of this duty is, of course, ordinarily simply a question of fact. With reference to the employment of minors it has been held as a matter of law that it is presumptive negligence to employ a boy of but twelve years of age in a mine to perform duties involving the personal safety of others: *Adams v. Snow*, 106 Wis. 152, 81 N. W. 983. This is in analogy to the presumption of the common law that a child under fourteen years of age is incapable of commission of a crime, the presumption being rebuttable when the child is over the age of seven: *Molaske v. Ohio Coal Co.*, 86 Wis. 220, 56 N. E. 475. There is, however, no presumption of negligence in employing a minor of seventeen years of age, even to perform such responsible duties as lowering the cage by which miners descended into the shaft of a mine: *Walkowski v. Consolidated Mines*, 115 Mich. 629, 73 N. W. 895. For other cases in which the presumption of incompetence has been applied to minors laboring in mines, particularly with reference to the question of contributory negligence on their part, see *Pratt Coal etc. Co. v. Browley*, 83 Ala. 371, 3 Am. St. Rep. 751, 3 South. 555; *Lovell v. De Bardelaben Coal Co.*, 90 Ala. 13, 7 South. 756; *Tutwiler Coal etc. Co. v. Enslen* (Ala., Feb. 1901), 30 South. 600.

B. Duty to Investigate Competence.—A mine owner is presumed to have done his duty and retained competent employés: *McCharles v. Mining Co.*, 10 Utah, 470, 37 Pac. 733; *Weeks v. Scharer*, 111 Fed. 330. Having done this he may rely upon the presumption of competency until he has knowledge or receives no-

tice of the contrary: *Walkowski v. Penokee etc. Con. Mines*, 115 Mich. 629, 73 N. W. 895; *McCharles v. Mining Co.*, 10 Utah, 470, 37 Pac. 733. One who seeks to charge the employer with negligence in this regard must, therefore, prove not only the incompetence of the employé, and that that incompetence was the proximate cause of the injury (*Handley v. Daly Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; *Adams v. Snow*, 106 Wis. 152, 81 N. W. 983), but he must also show that the master knew of that incompetence, or in the exercise of reasonable care and diligence would have known of it: *Acme Coal Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596; *Walkowski v. Penokee etc. Con. Mines*, 115 Mich. 629, 73 N. W. 895; *Handley v. Daly Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; *Weeks v. Scharer*, 111 Fed. 830. While, therefore, the mere negligence of an employé does not at all establish his incompetence, and while "carelessness" and "incompetence" are by no means interchangeable terms (*Kelly v. Cable Co.*, 13 Mont. 411, 34 Pac. 611; *Cerrillos Coal Co. v. Deserant*, 9 N. Mex. 49, 49 Pac. 807), if the conduct of an employé has been a series of notorious, long-continued, and habitual acts of recklessness, it may well be implied from this that the servant was incompetent, and that his incompetence must have been known to the mine owner, or would by the exercise of reasonable care have been discovered by him: *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596; *Walkowski v. Penokee etc. Con. Mines*, 115 Mich. 629, 73 N. W. 895; *McCharles v. Mining Co.*, 10 Utah, 470, 37 Pac. 733; *Handley v. Daly Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; *Stoll v. Daly Min. Co.*, 19 Utah, 271, 57 Pac. 295; *Weeks v. Scharer*, 111 Fed. 330. So, if the servant's reputation for incompetency is so general that negligence may be imputed for failure to make inquiry, and the proper inquiry would have disclosed it, the mine owner is properly chargeable with notice of his employé's incompetence: *Acme Coal Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596; *Walkowski v. Penokee etc. Con. Mines*, 115 Mich. 629, 73 N. W. 895; *Handley v. Daly Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; *McCharles v. Mining Co.*, 10 Utah, 470, 37 Pac. 733. Where, however, the negligent acts of the servant consist in a use of machinery such that it leaves no trace behind which it is the duty of the mine owner, upon inspection to see, no presumption of knowledge on his part can there arise: *Walkowski v. Penokee etc. Con. Mines*, 115 Mich. 629, 73 N. W. 895. On the other hand, while the competence or incompetence of an employé is usually determined not by one act but by a series of acts (see *supra*, p. 570), it may well be that a single act of negligence may be such, both in the circumstances under which, and the manner in which, it was committed as to show in itself the incompetence of the one committing it. Instances of these are acts which are wanton or malicious, and there can be but little doubt that if knowledge of such an act were brought home to the mine owner, his subsequent retention of the offender

in his service would be in itself sufficient to charge him with negligence in this regard: *Stoll v. Daly Min. Co.*, 19 Utah, 271, 57 Pac. 295. Notice of the incompetence of a fellow-servant of the one complaining, if not given directly to the master, must be given to some agent of the master clothed with authority to hire and discharge employes. Such notice is not sufficient to charge the master with negligence in retaining the incompetent, if given to one who, though authorized to supervise and direct the work, has not the authority to employ and dismiss: *Weeks v. Scharer*, 111 Fed. 330.

6. In Prescribing Rules.—Closely connected with the duty of a mine owner to employ and retain none but competent servants is his duty to make reasonable rules for their conduct in relation to their work. One who employs servants in a complex and dangerous business is bound to prescribe rules sufficient for its orderly and safe management, and his failure to do so is a personal negligence, for the consequences of which he is liable to his servants: *Southwest Improvement Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015. This rule, however, is applicable only where the complexity or nature of the business render the adoption of rules reasonably necessary. The mere failure to make and adopt rules is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen and appreciated the necessity of this precaution: *Johnson v. Portland Stone Co.* (Or., March, 1902), 67 Pac. 1013. When such reasonable rules are adopted and brought to the notice of the employes, however, it is the duty of the latter to obey them, and failure to do so will amount to contributory negligence: *Knoxville Iron Co. v. Smith*, 86 Tenn. 45, 5 S. W. 438.

III. Right of Mine Owner to Delegate Responsibility.

In the discharge of this duty to use all reasonable care and diligence to prevent injury to his employes, the mine owner frequently delegates its performance to servants and agents. This is, of course, especially and necessarily true where the mine owner is a corporation. In the nature of things a corporation cannot act personally. Its functions must be performed and its duties to its servants and others discharged through some representative. But this necessity of delegating the performance of its duties does not by any means carry with it an exemption of the responsibility of the mine owner for their negligent discharge. It is accordingly an undoubted principle in the law of master and servant that the responsibility of the former for failure to exercise reasonable care to prevent injuries to his servant, to provide him with a safe place in which, fit appliances with which, and competent co-servants among whom, to labor is one of which he cannot divest himself, however much he may delegate the performance of these duties. If the mine owner employ another to discharge the duties

owed by him to his employés, the acts of such person in the performance of these duties are the acts of the mine owner. If the duties are negligently performed, the mine owner is chargeable with this negligence. The person so employed becomes, not a fellow-servant of the other employés, but a vice-principal, and in so far as respects the discharge of the duties owed by the employer to his employés, stands in the place of and represents the mine owner: See post, p. 575, and monographic note to *Mast v. Kern*, 75 Am. St. Rep. 584, 626; *Eureka Co. v. Balss*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Beeson v. Mining Co.*, 57 Cal. 20; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Parke County Coal Co. v. Barth*, 5 Ind. App. 159, 31 N. E. 585; *Linton Coal Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214; *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158; *Blazenic v. Iowa etc. Coal Co.*, 102 Iowa, 706, 72 N. W. 292; *Cushman v. Carbondale Fuel Co. (Iowa)*, 88 N. W. 817; *Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122; *Hopkins v. O'Leary*, 176 Mass. 258, 57 N. E. 342; *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Ryan v. Bagaley*, 50 Mich. 179, 45 Am. Rep. 35, 15 N. W. 72; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535; *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368, 2 N. E. 24; *Spelman v. Fisher Iron Co.*, 56 Barb. 151; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510; *Wellston Coal Co. v. Smith* (principal case), 65 Ohio St. 70, 61 N. E. 143; *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468, 11 Pac. 612; *Cunningham v. U. P. Ry. Co.*, 4 Utah, 206, 7 Pac. 795; *Costa v. Pacific Coast Co. (Wash., Sept., 1901)*, 66 Pac. 398; *Western Coal Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71; *Sommer v. Carbon Hill Coal Co.*, 89 Fed. 54, 32 C. C. A. 156; *Weeks v. Scharer*, 111 Fed. 330. This subject of vice-principalship has already been considered at length, and with especial reference to employés in mines in the monographic note above referred to (75 Am. St. Rep. 584, see page 626), and further treatment of it in this connection is therefore unnecessary.

IV. Right of Mine Owner to Contract Against Liability for Negligence.

The right of an employer to contract against liability for his negligence resulting in injury to his employés is controlled by considerations of public policy much the same as those which prohibit him from delegating the responsibility for such negligence to another. It is, therefore, held that such contracts are void, and that neither by adopting rules nor by express agreement to that effect can a mine owner relieve himself of his liability to respond in damages for the failure to perform or for the negligent performance of the duties owed by him to his employés: *Chicago etc. Coal Co. v. Peterson*, 39 Ill. App. 114; *Consolidated Coal Co. v. Lundak*, 97 Ill. App. 109.

V. Assumption of Risks by Employés in Mines.

a. **General Rule.**—One who enters the service of another voluntarily does so in view of the risks ordinarily incident to that service. Those perils and hazards which ordinarily form a part of the labor in which he engages are deemed to have been in his contemplation and to have been assumed by him upon his entrance into the employment, and in legal presumption the compensation is adjusted accordingly: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535. Any person, therefore, who engages in the business of mining does so with a view to the dangers ordinarily incident to that employment, and assumes all risks arising from such dangers: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Sloss Iron etc. Co. v. Knowles* (Ala., Apr. 1901), 30 South. 584; *Sampson etc. Min. Co. v. Schaad*, 15 Colo. 197, 25 Pac. 89; *Sowden v. Idaho Quartz Min. Co.*, 55 Cal. 443; *Beeson v. Green Mountain etc. Min. Co.*, 57 Cal. 20; *Brazil etc. Coal Co. v. Cain*, 98 Ind. 282; *Brazil Black Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Parke County Coal Co. v. Barth*, 5 Ind. App. 159, 31 N. E. 585; *Forbes v. Boone Valley Coal etc. Co.* (Iowa, Jan. 1901), 84 N. W. 970; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631; *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Watson v. Kansas etc. Coal Co.*, 52 Mo. App. 366; *De Weese v. Meramec Iron Min. Co.*, 54 Mo. App. 476; *Quigley v. Bambrick*, 58 Mo. App. 192; *Smith v. Oxford Iron Co.*, 42 N. J. L. 467, 36 Am. Rep. 535; *Chicago etc. Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387; *Reddon v. U. P. Ry. Co.*, 5 Utah, 344, 15 Pac. 262; *Anderson v. Daly Min. Co.*, 16 Utah, 28, 50 Pac. 815; *South West Virginia Imp. Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015; *Sexton v. Turner*, 89 Va. 341, 15 S. E. 862; *Robinson v. Dininny*, 96 Va. 41, 30 S. E. 442; *Shannon v. Consolidated Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Berns v. Gaston Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; *Paule v. Florence Min. Co.*, 80 Wis. 350, 50 N. W. 189; *Tennessee Coal etc. Co. v. Currier*, 108 Fed. 19, 47 C. C. A. 161; *King v. Morgan*, 109 Fed. 446, 48 C. C. A. 507; *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266; *Clarke v. Holmes*, 7 Hurl. & N. 937.

b. Risks Ordinarily Incident to Mining.

1. **In General.**—Under the head of "ordinary risks" are classed all those dangers or perils ordinarily incident to the conduct of the particular business in which the employé engages. This includes not merely those dangers which are obvious and open, but also those risks which, while not visible, are nevertheless a natural incident of the employment. While, therefore, it is not infrequently said that the master, and not the servant, are bound to inspect

for latent dangers (*Indiana Coal Co. v. Buffey* (Ind. App.), 62 N. E. 279; *Linton Coal Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214; *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654, 58 N. E. 856; *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158; *Summit Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676), this must not be understood as meaning that only patent risks are among those assumed by the servant on entering the service of his master. As is said in *Linton etc. Min. Co. v. Persons*, 15 Ind. App. 69, 43 N. E. 652: "He does assume the risk of latent as well as patent dangers, which are a natural incident to the service, and which it is not the duty of the master to guard against; that is, dangers whether visible, known, or unknown, at the time of his employment, if they are such as naturally arise from the nature of the work to be performed, he assumes." And to the same effect, see *Sloss Iron etc. Co. v. Knowles* (Ala., Apr. 1901), 30 South. 584. Nor is it material that the service in which the employé engages is one in which, as in mining, the work is particularly hazardous. He assumes those risks ordinarily incident to that business, whether they be few or many: *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *King v. Morgan*, 109 Fed. 446, 48 C. C. A. 507.

2. Negligence of Fellow-servants.

A. General Rule.—Among those risks which are ordinarily incident to the business, none has more often engaged the attention of the courts than that arising from the negligence of co-employés. Where a mine owner has used due diligence and care to select and retain none but competent servants, he will not be liable for an injury to one employé, caused by the negligence of a fellow-servant. The dangers arising from this negligence are among those deemed to have been in the contemplation of the parties when they entered into the contract of employment, and is one of the risks ordinarily incident to the service in which the injured employé has engaged. The mine owner has discharged his duty to his employés when he uses reasonable care to supply them with co-servants competent to do the work required of them. For a breach of the duty owed by one employé to his fellow-servants to use reasonable diligence to avoid injuring them, the master is not liable. "The fellow-servant rule," says the court in *New Pittsburgh etc. Co. v. Peterson*, 136 Ind. 398, 43 Am. St. Rep. 327, 35 N. E. 7, "is founded in wisdom, and any departure from it is dangerous to the prosperity and perpetuity of the enterprises of manufacturing, mining, railroading, and those enterprises requiring the services of many servants. More than this, it increases the dangers to such servants who may be so employed. When the master has supplied a safe place to work, has employed skillful and diligent servants, and has furnished suitable and safe appliances with which to perform the service, it is a rare instance in which he is liable for injuries to his servants. The servants owe to the master a diligent and watchful care over his business,

and they owe to each other a vigilance and caution for their own safety. The master should not be held for the consequences of their unfaithfulness to him, unless he continues them with knowledge of their faithlessness. The master should not be liable for their neglect of the duty they owe to each other, for that is by no fault of his. The rule which deprives them of compensation for injuries sustained from the negligence each of the other inspires that care and diligence in the discharge of their duties, both to the master and to themselves, which is essential to the welfare of the master and the safety of each other. When the rule is destroyed, its inducement to care is gone, and the master, if not liable for the fault of his servants as between themselves, has servants whose duties require no care, excepting that each shall look to his own safety": See, also, *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 South. 455; *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 257; *Beeson v. Mining Co.*, 57 Cal. 20; *Snyder v. Viola etc. Co.*, 2 Idaho, 771, 26 Pac. 127; *Brazil etc. Coal Co. v. Cain*, 98 Ind. 282; *Quincy Min. Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *De Weese v. Meramec Iron Min. Co.*, 54 Mo. App. 476; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510; *Johnson v. Portland Stone Co. (Or., Mar. 1902)*, 67 Pac. 1013; *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270, 28 Atl. 1087; *Coal Creek Min. Co. v. Davis*, 90 Tenn. 711, 18 S. W. 387; *Hughes v. Oregon Imp. Co.*, 20 Wash. 294, 55 Pac. 119; *Wiskie v. Montello Granite Co.*, 111 Wis. 443, post, p. 885, 87 N. W. 461; *Howells v. Landore-Siemens Steel Co.*, L. R. 10 Q. B. 62, 44 L. J. Q. B. 25; *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Hall v. Johnson*, 3 Hurl. & C. 589.

B. Who are Fellow-servants in Mines.—Any extended discussion of the various qualifications and limitations which have been engrafted on the fellow-servant rule by the courts of the various states in the innumerable cases in which it has been considered is here unnecessary. No distinction is made in their application between the relation of mine owner and employé, and that of any other master and servant. The most important qualification of the rule, that of vice-principalship, has already been considered: *Supra*, pp. 571, 572.

When a "mine boss" is required by statute to be employed by the owner, it is held in some states that he is a fellow-servant with a miner: *Colorado Coal etc. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Voshefsky v. Hillside Coal etc. Co.*, 21 App. Div. 168, 47 N. Y. Supp. 386; *Durkin v. Kingston Coal Co.*, 171 Pa. St. 193, 50 Am. St. Rep. 801, 33 Atl. 237; *Delaware etc. Canal Co. v. Carrol*, 89 Pa. St. 374; *Reese v. Biddle*, 112 Pa. St. 72, 3 Atl. 813; *Waddell v. Simoson*, 112 Pa. St. 567, 4 Atl. 725; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 27 Atl. 577; *Williams v. Coal Co.*, 44 W. Va. 599, 30 S. E. 107; *Howells v. Landore-Siemens Steel Co.*, L. R. 10 Q. B. 62, 44 L. J. Q. B. 25. While in other states the contrary view is taken: *Linton Coal etc. Co. v. Persons*, 11 Ind. App. 264, 39 N. E.

214; Eureka Black Coal Co. v. Wells (Ind. App., Oct. 1901), 61 N. E. 326; Cherokee etc. Co. v. Britton, 3 Kan. App. 292, 45 Pac. 100. An ordinary mine boss or foreman whose employment was in no way compulsory has also been held to be a fellow-servant of a miner: Stephens v. Doe, 73 Cal. 26, 14 Pac. 378. See, also, Wilson v. Merry, L. R. 1 H. L. S. 326. The better rule is, however, that this question is entirely dependent upon the nature of the work the boss was engaged in when guilty of the negligence causing the injury. If he was performing for the master any duty owed by the latter to his employes, his negligence would be that of a vice-principal, rather than that of a fellow-servant: Westville Coal Co. v. Schwartz, 177 Ill. 272, 52 N. E. 276; Consolidated Coal Co. v. Scheiber, 167 Ill. 539, 47 N. E. 1052; Wellston Coal Co. v. Smith (principal case), 65 Ohio St. 70, ante, p. 547, 61 N. E. 143; Russell Creek Coal Co. v. Wells, 96 Va. 416, 31 S. E. 614. The engineer in charge of the hoisting machinery is a fellow-servant of the miners working at the mine: Trewatha v. Gold Min. etc. Co., 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; Mantio Coal etc. Co. v. Leonard, 25 Ill. App. 95; Mulhern v. Lehigh Valley Coal Co., 161 Pa. St. 270, 28 Atl. 1087, 1088; Bartonshill Coal Co. v. Reid, 3 Macq. 266. See, also, Whatley v. Zenida Coal Co., 122 Ala. 118, 26 South. 124. A man who gives a signal to hoist is held to be a coservant of a miner: Acme Coal Min. Co. v. McIver, 5 Colo. App. 267, 38 Pac. 596. And a miner has been held to be a fellow-servant with one whose duty it is to inspect the roof of the mine: Gilmore v. Oxford Iron etc. Co., 55 N. J. L. 39, 25 Atl. 707; Hall v. Johnson, 3 Hurl. & C. 589. See, also, Trougher v. Lower Vein Coal Co., 62 Iowa, 576, 17 N. W. 775. See, also, monographic note to Mast v. Kern, 75 Am. St. Rep. 584, 626.

C. Where Negligence of Fellow-servant and of Mine Owner Contribute to the Injury.—In order, however, that the mine owner be relieved from liability on the ground that the injury was the result of the negligence of a fellow-servant with the party injured, there must have been no negligence on the part of the master. If an employe is injured by the combined negligence of the mine owner and of a fellow-servant, the master is responsible for the injury. Where the negligent acts of two parties concur in causing an injury, the negligence of each is a proximate cause, and it is immaterial that the negligence of another contributed to produce the damage. The case is one of joint tort feorsors, and both are undoubtedly liable: Hancock v. Keene, 5 Ind. App. 408, 32 N. E. 329; De Weese v. Meramec Iron Min. Co., 54 Mo. App. 476, affirmed in 128 Mo. 423, 31 S. W. 110; Cerrillos Coal Co. v. Deserant, 9 N. Mex. 49, 49 Pac. 807; Handley v. Daly Min. Co., 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; Costa v. Pacific Coast Co. (Wash., Sept. 1901), 66 Pac. 398; Deresant v. Cerrillos Coal R. Co., 178 U. S. 409, 20 Sup. Ct. Rep. 967. In Berns v. Gaston Gas Coal Co., 27 W. Va. 285, 55 Am. Rep. 304, it is held that if fire damp accumulates in a mine by reason of the mine owner's negligence, and is ignited by the act of a miner, a fellow-servant

of the latter cannot recover for an injury caused by the explosion. The distinction taken by the court between concurring and intervening causes is undoubtedly valid, and is well established (see *Handley v. Daly Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295), but its application to the facts present in the case is doubtful.

c. Risks not Ordinarily Incident to Mining.

1. **General Rule.**—Risks other than those ordinarily incident to the business of mining, unless they are known to the employé, or such as should have been known to him, are not assumed by merely entering into the service of the mine owner. Extraordinary dangers, or those which are not necessarily or usually connected with mining operations, cannot, of course, be presumed to have been contemplated by either party to the contract of employment, nor can the compensation be reasonably supposed to have been agreed upon with a view to their assumption by the employé: *Beeson v. Mining Co.*, 57 Cal. 20; *Watson v. Kansas etc. Coal Co.*, 52 Mo. App. 366; *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah, 468, 11 Pac. 612; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *McMahon v. Ida Min. Co.*, 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478.

2. Duty of Mine Owner to Warn Concerning.

A. **In General.**—As to these extraordinary dangers, it is the duty of the master to warn his employés. And while there is no duty resting upon a mine owner to warn his servants of those risks which are open and obvious (*King v. Morgan*, 109 Fed. 446, 48 C. C. A. 507; *Moon-Anchor Con. Gold Mines v. Hopkins*, 111 Fed. 298), whenever he has or should in the exercise of reasonable care have knowledge of a defect unknown to his employés, and one which they could not reasonably be expected to discover, it becomes his duty to apprise them of this extra hazard, and, if need be, to warn them of its danger: *Consolidated Coal Co. v. Wambacher*, 134 Ill. 57, 24 N. E. 627; *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Andrews v. Tamarack Min. Co.*, 114 Mich. 375, 72 N. W. 242; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835, affirmed in *Belleville Stone Co. v. Mooney*, 61 N. J. L. 253, 39 Atl. 764; *Spelman v. Iron Co.*, 56 Barb. 151; *Shannon v. Consolidated etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169; *McMahon v. Ida Min. Co.*, 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478; *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. Rep. 464. Thus, it has been held to be the duty of the mine owner to warn his servants of charges of powder prepared by the men on another shift, and not yet exploded: *Shannon v. Consolidated Tiger etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169; *McMahon v. Ida Min. Co.*, 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 748. And the same has been held with reference to his duty to warn them of a blast in time to permit their escape: *Belleville Stone Co. v. Mooney*, 60 N. J. L.

323, 38 Atl. 835; Belleville Stone Co. v. Mooney, 61 N. J. L. 253, 39 Atl. 764 (see note to Mast v. Kern, 75 Am. St. Rep. 618), and of a defect in the mines known to the mine owner, but not to his employé: Consolidated Coal Co. v. Wambacher, 134 Ill. 57, 24 N. E. 627; Andrews v. Tamarack Min. Co., 114 Mich. 375, 72 N. W. 242.

B. Minors, Inexperienced Employés, etc.—Where the employé is a child or a person inexperienced in mining, and so unable to appreciate the danger, the mine owner owes him the duty of giving warning as to dangers which in the case of an adult and experienced servant might be entirely unnecessary, as is said in King v. Morgan, 109 Fed. 446, 48 C. C. A. 507: "The duty of cautioning a servant rests upon the master only in case he is informed or has reason to believe that the servant is inexperienced and ignorant of the probable dangers he is about to encounter. The master, in the absence of such information, may assume that an applicant who is apparently mature and intelligent is qualified for the particular work applied for by him." Where, however, the employé is a child, or is known to the mine owner to be inexperienced, reasonable care demands that such person be warned. The duty of the mine owner in such a case is well expressed in Jones v. Florence Min. Co., 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207, as follows: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing work is dangerous and apparent to a person of capacity and knowledge on the subject, yet if a servant employed to do work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely with proper care on his part. This rule does not in any manner conflict with the other well-established rule that the employé in any particular business assumes all the risks and hazards which are incident to such business when the employé is of sufficient intelligence and knowledge to comprehend the dangers incident to his employment; and, in the case of an adult person, in the absence of evidence showing the contrary, the presumption is that the employé has sufficient intelligence to comprehend the dangers incident to his employment": See, to the same effect, Consolidated Coal Co. v. Wombacher, 31 Ill. App. 288; Brazil Block Coal Co. v. Young, 117 Ind. 520, 20 N. E. 423; Trump v. Fildewater Coal etc., 46 W. Va. 238, 32 S. E. 1035; Moon-Anchor Con. Gold Mines v. Hopkins, 111 Fed. 298. If, however, a minor fully knows and appreciates the dangers of the employment into which he enters, he undoubtedly assumes the risks ordinarily incident to the business of mining: Harris v. McNamara, 97 Ala. 181, 12 South. 103; Brazil Block Coal Co. v. Gaffney,

119 Ind. 455, 12 Am. St. Rep. 422, 21 N. E. 1102; *Brazill etc. Co. v. Young*, 117 Ind. 520, 20 N. E. 423.

3. Negligence of Mine Owner.

A. General Rule—Not Risk Assumed.—Negligence on the part of the mine owner is not, in theory at least, one of the risks ordinarily incident to mining, and hence, it is well settled, is not a risk assumed by one merely engaging as an employé in the service of a mine owner. The doctrine of assumed risks "presupposes that the master has performed the duties of caution, care, and vigilance which the law casts on him. It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes": *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368, 2 N. E. 24. The mine owner's duty to maintain a reasonably safe place, to provide reasonably fit appliances, or to employ reasonable care in the selection of competent coservants, is in no way lessened by any assumption of risks on the part of the employé: *Eureka Block Coal Co. v. Wells* (Ind. App.), 61 N. E. 236; *Forbes v. Boone Valley Coal etc. Co.* (Iowa), 84 N. W. 970; *Eddy v. Aurora etc. Min. Co.*, 81 Mich. 548, 46 N. W. 17; *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835, affirmed in 61 N. J. L. 253, 39 Atl. 764; *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368, 2 N. E. 24; *Handley v. Daly Min. Co.*, 15 Utah, 176, 62 Am. St. Rep. 916, 49 Pac. 295; *Tribay v. Brooklyn Lead Mine Co.*, 4 Utah, 468, 11 Pac. 612; *Faulkner v. Mammoth Min. Co.* (Utah), 66 Pac. 799.

Ordinarily, therefore, the servant is entitled to assume that his master has performed the duties which the law imposes upon him. He is not bound to search for latent dangers or for such as are not ordinarily incident to the work in which he is engaged. The duty of furnishing a reasonably safe place, of supplying appliances adapted to the service expected of them, and of using reasonable care in the selection and retention of employés, rests primarily upon the master, and in the absence of facts such that a reasonably prudent man would know that the mine owner was neglecting his duties in this regard, the employé may, it is held, assume that his employer has fulfilled these obligations: *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158; *Linton Coal etc. Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214; *Summit Coal Co. v. Shaw*, 16 Ind. App. 9, 44 N. E. 676; *Indiana etc. Coal Co. v. Buffey* (Ind.), 62 N. E. 279; *Forbes v. Boone Valley Coal Co.* (Iowa), 84 N. W. 970; *Ashland Coal etc. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Watson v. Kansas etc. Coal Co.*, 52 Mo. App. 366; *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 10 U. S. App. 439.

B. Where Employé Knows or Should Know of Defect.—If, however, an employé, either before he enters the service of a mine owner or afterward, discovers that his employer is guilty of neglect of duty in any particular, such that the dangers incident to the employment are thereby increased, he is deemed to have assumed

this increased risk, if without objection he continues in the work. This is true, whether the defect be in the instrumentalities furnished by the employer, in the hazardous method of conducting the business, in the dangerous place provided, or in the incompetence of those whom the mine owner selects and retains as employes. No one can thus knowingly expose himself to a peril, whether it be caused by the negligence of another or by any other cause, and then recover for an injury which he has so invited. A mining employé, therefore, assumes not only those dangers ordinarily incident to the business in which he engages, but also those other perils arising from defects of which he has knowledge: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Sloss Iron etc. Co. v. Knowles* (Ala.), 30 South. 584; *Beeson v. Mining Co.*, 57 Cal. 20; *Victor Coal Co. v. Muir*, 20 Colo. 320, 46 Am. St. Rep. 299, 38 Pac. 373; *Westville Coal Co. v. Schwartz*, 177 Ill. 272, 52 N. E. 276; *Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455, 12 Am. St. Rep. 422, 21 N. E. 1102; *Brazil Block Coal Co. v. Young*, 117 Ind. 520, 20 N. E. 423; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Beckman v. Consolidated Coal Co.*, 90 Iowa, 252, 57 N. W. 889; *Forbes v. Boone Valley Coal etc. Co.* (Iowa), 84 N. W. 970; *Oleson v. Maple Grove etc. Coal Co.* (Iowa, Oct. 1901), 87 N. W. 736; *Breckinridge Co. v. Hicks*, 94 Ky. 362, 42 Am. St. Rep. 361, 22 S. W. 554; *Myers v. Hudson Iron Co.*, 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631; *Andrews v. Tamarack Min. Co.*, 114 Mich. 375, 72 N. W. 242; *Spiva v. Osage Coal etc. Co.*, 88 Mo. 68; *Cerrillos Coal Co. v. Deserant*, 9 N. Mex. 49, 49 Pac. 807; *Szatak v. Coal Co.*, 36 Misc. Rep. 98, 72 N. Y. Supp. 647; *Eodes v. Clark*, 55 N. Y. Super. Ct. 132; *Chicago etc. Coal Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Johnson v. Portland Stone Co. (Or.)*, 67 Pac. 1013; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. St. 153, 27 Atl. 577; *Reddon v. Union Pacific Ry. Co.*, 5 Utah, 344, 15 Pac. 262; *McCharles v. Horn etc. Min. Co.*, 10 Utah, 470, 37 Pac. 733; *Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547, 689; *Berns Gaston Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304; *Graham v. Newburgh etc. Coal Co.*, 38 W. Va. 273, 18 S. E. 584; *Williams v. Thacker Coal Co.*, 44 W. Va. 599, 30 S. E. 107; *Weeks v. Scharer*, 111 Fed. 330; *Paterson v. Wallace*, 1 Macq. 748. Nor is it essential that he have actual knowledge of the defect from which the increased risk springs. Whenever the defect was such that the employé would, in the exercise of reasonable diligence and caution, have discovered it, he is deemed to have assumed the risk: *Beeson v. Mining Co.*, 57 Cal. 20; *Sowden v. Mining Co.*, 55 Cal. 443; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Acme Coal Min. Co. v. McIver*, 5 Colo. App. 267, 38 Pac. 596; *Consolidated Coal Co. v. Wambacher*, 134 Ill. 57, 24 N. E. 627; *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654, 58 N. E. 856; *Forbes v. Boone Valley Coal Co.* (Iowa), 84 N. W. 970; *Wahlquist v. Maple Grove Coal etc. Co.* (Iowa), 89 N. W. 98; *Quick v. Minnesota Iron Co.*, 47 Minn. 361, 50 N. W. 244; *Fisher v. Central Lead Co.*, 156 Mo. 479, 56 S. W.

1107; *Watson v. Coal Co.*, 52 Mo. App. 366; *Patnade v. Harter*, 20 Nev. 303, 21 Pac. 679; *Reddon v. Union Pacific Ry. Co.*, 5 Utah, 344, 15 Pac. 262; *McCharles v. Horn etc. Min. Co.*, 10 Utah, 470, 37 Pac. 733; *Fowler v. Pleasant Valley Coal Co.*, 16 Utah, 348, 52 Pac. 594; *Robinson v. Dunning*, 96 Va. 41, 30 S. E. 442; *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614. It does not follow, however, from the mere fact that the defect was equally open to the observation of the mine owner and employé, that the latter necessarily assumes the risk: *Linton Coal etc. Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214. He assumes such risks only as arise from defects in some way connected with the work he is expected to do, and not those arising from defects from which he would ordinarily incur no danger: *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741.

C. Where Mine Owner Promises to Remedy Defect.—To this rule that the servant assumes the risk arising from any peril of which he has knowledge, or of which it is his duty to know, there is a most important qualification. If the defect is such that danger is reasonably to be apprehended, the employé must, in the exercise of due diligence, either abandon the service, or report the defect to his employer, the mine owner. If he elects to do the latter, and the mine owner promises to remedy the defect, the relationship of the parties with reference to the risk immediately changes. The assurance of the employer that he will remedy the defect complained of amounts to an agreement on his part which justifies the employé in remaining in the service for a reasonable time, and takes from the servant the risk which he would otherwise be held to have assumed by so continuing at work: *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216; *Stiles v. Richie*, 8 Colo. App. 393, 46 Pac. 694; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Taylor v. Star Coal Co.*, 110 Iowa, 40, 81 N. W. 249; *Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122; *Breckenridge County v. Hicks*, 94 Ky. 362, 42 Am. St. Rep. 361, 22 S. W. 554; *Chicago etc. Co. v. Norman*, 49 Ohio St. 598, 32 N. E. 857; *Webster v. Monongahela River etc. Co. (Pa.)*, 50 Atl. 964; *Reddon v. Union Pac. Ry. Co.*, 5 Utah, 344, 15 Pac. 262; *Berns v. Gaston Gas Coal Co.*, 27 W. Va. 285, 55 Am. Rep. 304.

D. Where Reasonable Time has Elapsed after Promise to Remedy.—The right of the servant to rely upon this promise of the mine owner to repair does not, however, continue after a reasonable time has elapsed within which to make the repairs, and they have not been made. "If the employé continues to expose himself to the danger by remaining in the service longer than this, he does so in the face of the fact that the promise of the employer is violated, and that he has no reasonable expectation of its fulfillment. He can no longer, therefore, rely upon the promise, and must know that his continuance in the service under such circumstances is equally as hazardous and hopeless of remedy as if no assurance or promise had ever been made. A promise already broken

can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances. . . . The continuance in the service for an unreasonable length of time after such promise is a waiver of the defects agreed to be remedied by the employer": *Eureka Co. v. Bass*, 81 Ala. 200, 60 Am. Rep. 152, 8 South. 216. And to the same effect see *Davis v. Graham*, 2 Colo. App. 210, 29 Pac. 1007; *Chicago etc. Coal Co. v. Peterson*, 39 Ill. App. 114; *Taylor v. Star Coal Co.*, 110 Iowa, 40, 81 N. W. 249; *Morbach v. Home Min. Co.*, 53 Kan. 731, 37 Pac. 122.

E. Where Danger is Immediate.—Moreover, even if the mine owner has promised to repair, the employé must still use ordinary prudence. If, therefore, the defect is so manifestly and immediately dangerous that a man of ordinary prudence would have refused to work while it continued, the employé cannot rely upon the employer's promise to repair: *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9, 54 N. E. 567; *Chicago etc. Coal Co. v. Peterson*, 39 Ill. App. 114; *Adams v. Kansas etc. Coal Co.*, 85 Mo. App. 486; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484, 41 Pac. 273; *Miller v. Bullion Beck etc. Min. Co.*, 18 Utah, 358, 55 Pac. 58. If the danger is immediate and obvious, it is plain that the promise of the mine owner to repair the defect from which it arises cannot justify the employé in exposing himself in the meantime, and if he does so expose himself he is held to have assumed the risk.

4. Where Employé is Under Direct Superintendence of Mine Owner or Foreman.—Where the employé acts under the direct superintendence or orders of the mine owner, or under the immediate supervision of his master's alter ego, the mine foreman, he may, it is held, rely upon the performance of the master's duty, and assumes no risks except such as are ordinarily incident to the service in which he is engaged: *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57, 24 N. E. 627; *Wahlquist v. Maple Grove Coal etc. Co. (Iowa)*, 89 N. W. 98; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510; *Faulkner v. Mammoth Min. Co. (Utah)*, 66 Pac. 799. This, however, is applicable only when the danger is not so obvious as to prevent a reasonably prudent man from assuming the risk. If the danger be obvious and immediate, the employé who exposes himself to it must be held to have assumed the risk invited by his act: *Faulkner v. Mammoth Min. Co. (Utah)*, 66 Pac. 799.

d. Where Service is Involuntary.—In order that there may be any assumption of risks by an employé, his service must be voluntary. The entire doctrine of assumed risks is based upon contract, a particular in which it differs from that of contributory negligence. The theory upon which risks are deemed to be assumed is that "when a servant enters upon or continues in a service, with full knowledge that it is dangerous, and is fully aware of the extent of the danger to which he is exposed, there is an implied contract of assumed risk by which, on the principle

of the maxim 'Volenti non fit injuria,' the servant waives his right to recover for injuries received by him in such service": *Faulkner v. Mammoth Min. Co.* (Utah), 66 Pac. 799. The first essential, therefore, of this, as of any other contract, is that it be the result of a voluntary act, and not of constraint of any kind, such as to deprive the act of its voluntary nature: *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501. A convict, compelled to labor in a mine against his will, cannot, it follows, be said to assume any risks whatever, and in *Buckalew v. Tennessee Coal etc. Co.*, 112 Ala. 146, 20 South. 606, it is so held, the court there saying: "The intestate had made no contract with anyone. His servitude was involuntary. It was enforced. He had no right or power to refuse to enter upon the service, or to quit it at any time until his sentence expired. Whatever may have been the danger of the service, howsoever incompetent, careless, or vicious may have been the defendant's agents or servants put to work with or over him, the convict had no voice, volition, or freedom of action in the matter whatever. He had entered into no contract, express or implied, to take the risks of the wrongful acts and omissions of the defendant's servants. He was a fellow-servant with no one." The case is valuable because, although based upon a state of facts of quite infrequent occurrence, it clearly defines the theory of assumed risks to be that of contract, and establishes the principle that, in order that there be such an assumption of risks, express or implied, all the essentials of a contractual obligation must be present.

e. **Knowledge of Both Defect and Danger Essential.**—In order that there be an assumption of any risk, the defect from which it arises must, as we have seen, be such that the employé knew of it, or would in the exercise of reasonable care have discovered it. It is not, however, sufficient that he merely knows of the defect. He must also appreciate the danger connected with it, or he cannot be held to have assumed the risk. Both of these elements—i. e., knowledge of defect and appreciation of danger—are necessary to support an assumption of risks: *Jupiter Coal Mine Co. v. Mercer*, 84 Ill. App. 96; *Cushman v. Carbondale Fuel Co.* (Iowa), 88 N. W. 817; *Ashland Coal etc. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Watson v. Kansas etc. Coal Co.*, 52 Mo. App. 366; *Monahan v. Kansas etc. Co.*, 58 Mo. App. 68; *Webster v. Monongahela River etc. Co.* (Pennsylvania, Jan. 1902), 50 Atl. 964; *Knoxville Iron Co. v. Pace*, 101 Tenn. 476, 48 S. W. 232; *Mangum v. Bullion Beck etc. Min. Co.*, 15 Utah, 534, 50 Pac. 834; *Graham v. Newburgh Orrel etc. Coke Co.*, 38 W. Va. 273, 18 S. E. 584. Where however, the danger is so obvious, or is such that a reasonably intelligent and prudent man would have known of it, the employé will not be permitted to hide behind his ignorance of the risk. He will be charged with knowledge of the danger: *Ashland Coal etc. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; *Watson v. Kansas etc. Coal Co.*, 52 Mo. App. 366; *Monahan v. Kansas City*

etc. Co., 58 Mo. App. 68; Mangum v. Bullion Beck etc. Min. Co., 15 Utah, 534, 50 Pac. 834.

Where a mine owner assures his employé that the danger is not at all great, the employé may well rely upon this assurance, unless he himself knows the contrary to be true, or the danger is such that a reasonably prudent man would not have remained working, even in the face of the employer's assurance of safety: Fowler v. Pleasant Valley Coal Co., 16 Utah, 348, 52 Pac. 594; Miller v. Bullion Beck etc. Min. Co., 18 Utah, 358, 55 Pac. 58; Graham v. Newburgh Orrell etc. Coke Co., 38 W. Va. 273, 18 S. E. 584.

VI. Statutory Regulations.

a. In General.

1. **Nature and Constitutionality of.**—Up to this point the consideration of the duty of mine owners to prevent injury to their employés has been confined to the principles of the common law which govern the subject. These are in the main the same as those controlling the relation of master and servant generally. In but few states, however, in which mining plays any important part as an industry is the regulation of its conduct left entirely to the rules of the common law. In all, or nearly all, such states statutes have been enacted with especial reference to the dangers of mining, their object being, of course, the reduction of these dangers by requiring of the persons engaged in this business the adoption of certain prescribed precautions and measures. In Illinois, Arkansas, and Colorado, these statutes were enacted under express mandates of the state constitutions requiring the legislature to pass laws for the protection of miners. The general tendency of all seems not to be toward making the duties of mine owners or operators more irksome, but toward making them more definite, and with reference to those dangers which are greatest or most frequently disastrous, to prescribe certain definite precautions or remedies.

The justification for these statutes is not far to seek. The particularly hazardous nature of the business, the number of men usually employed in its prosecution, and the extent to which the safety of all depends upon the care and vigilance of the mine owner, all render the industry of mining a subject eminently proper for regulation under the police power of the state. In *State v. Murlin*, 137 Mo. 297, 38 S. W. 923, the history of legislation of this character in England and in this country is reviewed, its necessity is considered, and the following language used in upholding the constitutionality of a statute of Missouri requiring mine owners to employ "shot firers": "If the legislature can regulate the harmless business of the citizen, on the ground that possible fraud may be perpetrated, surely there can be no hesitation in holding that a regulation requiring mine owners, who operate mines in which the dangerous agency of blasting powder is used, to so use and

handle that powder as to protect the lives and insure the safety of their miners is a fair and reasonable exercise of the police power, and is within the well-recognized scope of legislation. One of the great purposes of the people of this commonwealth in establishing a legislative department of our state government was to devise ways and rules to conserve the health and lives of its people. The constitution lays down certain great and fundamental principles according to which the legislature is to govern, but it commits to the legislature the right and duty of formulating all auxiliary rules to effectuate the principles of the constitution, and it would be hard to conceive of a more necessary and beneficial exercise of its power than it has shown in prescribing rules for that class of laborers whose duties so constantly expose them to great perils. . . . As to the subject matter of this legislation, we cannot doubt its constitutionality." And to the same effect, see *Sloss Iron etc. Co. v. Knowles* (Ala.), 30 South. 584; *Chicago etc. Co. v. People*, 181 Ill. 270, 54 N. E. 961; *Hamman v. Central etc. Coke Co.*, 156 Mo. 232, 56 S. W. 1091; *Consolidated Coal etc. Co. v. Clay*, 51 Ohio St. 542, 38 N. E. 610; *Commonwealth v. Bonnel*, 8 Phila. 534; *Sommer v. Carbon Hill Coal Co.*, 89 Fed. 54, 32 O. C. A. 156.

2. **Effect of, Upon Liability of Mine Owner at Common Law for Negligence.**—Statutes of this nature do not supplant the common law as to negligence—that is, they do not form a code by which, and by which alone, the regulation of the relation of mine owner and employé is to be governed. As to those cases unprovided for by the statute, the general law prevails, and if a mine owner is negligent in such a particular, he is liable, although he may have fulfilled the requirements of the statute. "The legislature could form a complete code of rules so particular and minute in their character as to cover all common-law rights with reference to any particular business, and in that event there would be a complete supercedure. But, unless that is done, all common-law rights not at variance with some provision of the enactment would continue in force": *Consolidated Coal Co. v. Bokamp*, 75 Ill. App. 605. Indeed, such statutes, instead of taking away the common-law right of action for negligence, are held to give one whenever the breach of the statute results in injury to another. Thus, where a statute prohibited the employment in a mine of a boy less than twelve years of age, and made the breach of the statute a misdemeanor, it was held that a right of action for negligence was conferred by the act, although not by its terms. The employment of such a boy in violation of the statute was, it was held, negligence, for which, whenever the injury was shown to have been the consequence of it, recovery might be had: *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460. And to same effect, see *Mosgrove v. Zimbleman Coal Co.*, 110 Iowa, 169, 81 N. W. 227.

3. **Effect of Violation of.**—But while such statutes do not supplant the common-law rules as to negligence in cases which their

provisions do not cover, as to those which they do control, their effect is to define what is "reasonable care" in that particular. In the language of Judge Morrow, in *Sommer v. Carbon Hill Coal Co.*, 89 Fed. 54, 32 C. C. A. 156: "In this respect, such a law is in effect the measure of that reasonable care which the owner or operator of a coal mine is required to take to avoid responsibility for injuries to workmen. . . . The general duty imposed by law upon the master is to provide a suitable and reasonably safe place for the doing of the work to be performed by the servant. What is a reasonably safe place is generally governed by the circumstances of each particular case; but here the law, having regard to the hazardous nature of the employment, has undertaken to provide adequate protection by imposing on the master a specific duty, which he must perform to escape the charge of negligence." Whether "reasonable care" was exercised, ordinarily a question of fact for the jury, becomes, under these statutes, a question of law. Proof that the defendant has violated a statute such as this, and that the violation has resulted in injury to the plaintiff, an employé, is therefore sufficient proof of the mine owner's negligence: *Jupiter Coal Min. Co. v. Mercer*, 84 Ill. App. 96; *Hochstettler v. Mosler Coal etc. Co.*, 8 Ind. App. 442, 35 N. E. 927; *Mosgrove v. Zimbleman Coal Co.*, 110 Iowa, 169, 81 N. W. 227; *Godfrey v. Beattyville Coal Co.*, 101 Ky. 339, 41 S. W. 10; *Adams v. Kansas etc. Coal Co.*, 85 Mo. App. 486; *Queen v. Dayton Coal etc. Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460; *Deserant v. Cerillos Coal R. Co.*, 178 U. S. 409, 20 Sup. Ct. Rep. 967, reversing 9 N. Mex. 495, 55 Pac. 290. Nor is the intent of the mine owner to comply in good faith with the statute material. He is liable in spite of such intent: *Odin Coal Co. v. Denman*, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192.

4. Contributory Negligence of Employé as Defense to Action for Violation of.—As to whether or not contributory negligence on the part of the employé is a defense of which the mine owner may avail himself when his breach of a statute has caused the injury, the authorities are involved in some little conflict. In Illinois, neither contributory negligence nor the doctrine that an employé assumes the risk of injury from the negligence of his fellow-servants is deemed applicable to a case where the master's failure to obey the statute has caused the injury. The reasons for this view are stated as follows in *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131: "To hold that the same principle as to contributory negligence should be applied in case of one who is injured in a mine because the owner, operator, or manager totally disregarded the statutes, as in other cases of negligence, is to totally disregard the provisions of the constitution which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute, and in no manner regard the duty of protecting the life and safety of miners. A willful disregard by the employer of a duty imposed is a willful exposure to liability to injury of the employé, and is an act of negligence, of so gross a

character and so utterly in disregard of law, that the question of contributory negligence, merely, has no place in the case, as relieving such owner, operator, or manager from liability for an injury which has resulted solely from the fact of such negligence." And such is undoubtedly the law of Illinois: *Cotlett v. Young*, 143 Ill. 74, 32 N. E. 447; *Bartlett Coal etc. Co. v. Roach*, 68 Ill. 174; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Niantic Coal etc. Co. v. Leonard*, 126 Ill. 216, 19 N. E. 294; *Pawnee Coal Co. v. Royce*, 184 Ill. 402, 56 N. E. 621; *Odin Coal Co. v. Denman*, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; *Western Anthracite Coal etc. Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335; *Jupiter Coal Mine Co. v. Mercer*, 84 Ill. App. 96. The reasoning of these cases is, however, by no means satisfactory, and the contrary and preferable view has been adopted in Colorado, Indiana, Kentucky, Missouri, Ohio, Tennessee, and England. The reasons in support of this latter doctrine are both obvious and satisfactory. It is not apparent why the doctrines of contributory negligence and assumed risk should not apply to cases of statutory negligence to the same extent as to cases of common-law negligence. So far as their application defeating the objects of statutes of this nature is concerned, it may be said that, however great be the duties such enactments may demand of the mine owner, and however high the degree of care required of him in their performance, the statutes did not thereby intend to relieve the employé of all duty of exercising care. The policy of a statute passed to protect the lives and safety of mine employés is certainly not advanced by a construction which, while it demands of the mine owner the exercise of a high degree of care, demands none of his employés upon the care and diligence of each of whom, perhaps, more than upon that of the mine owner, the life and safety of every other employé depends. It is, therefore, the doctrine of the states above named that the doctrines both of contributory negligence and of assumed risks are applicable even when the injury has occurred by reason of a violation of the statutory duty of the mine owner or operator: *Victor Coal Co. v. Muir*, 20 Colo. 320, 46 Am. St. Rep. 299, 38 Pac. 378; *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654, 58 N. E. 856; *Hochstettler v. Mosier Coal etc. Co.*, 8 Ind. App. 442, 35 N. E. 927; *Linton Coal etc. Co. v. Persons*, 11 Ind. App. 264, 36 N. E. 214; *Godfrey v. Coal Co.*, 101 Ky. 339, 41 S. W. 10; *Spiva v. Osage Coal Co.*, 88 Mo. 68; *Adams v. Kansas etc. Coal Co.*, 85 Mo. App. 486; *Coal Co. v. Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Queen v. Dayton Coal Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460; *Wilson v. Merry*, L. R. 1 H. L. S. 326. See, also, *Caswell v. Worth*, 5 El. & B. 848.

5. **Violation must be Proximate Cause of Injury.**—The mere violation of the statute, however, gives no cause of action even if injury to an employé has occurred, unless the violation of the statute was the proximate cause of the injury. This is held even where, as in Illinois, the doctrine of contributory negligence is held inapplicable to actions based on the failure of the mine owner or

operator to perform his statutory duties: *Missouri etc. Coal Co. v. Schwalb*, 74 Ill. App. 567; *Christner v. Cumberland etc. Coal Co.*, 146 Pa. St. 67, 23 Atl. 221; *Queen v. Dayton Coal Co.*, 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460.

6. Meaning of "Willful" in Statutes of this Nature.—In these statutes requiring of the mine owner or operator certain precautions for the safety of those employed by him, a frequent provision is that giving to the heirs or representatives of one whose death is caused by the "willful failure" of the mine owner to comply with the statute a cause of action for the damage done there by such failure. Under provisions such as this it is uniformly held that the violation of the statute, which shall give rise to this cause of action, must be "willful": *Hawley v. Dailey*, 13 Ill. App. 391; *Missouri etc. Coal Co. v. Schwalb*, 74 Ill. App. 567; *Donk Bros. Coal Co. v. Peton*, 192 Ill. 41, 61 N. E. 330, affirming 95 Ill. App. 193. This does not, however, mean that the breach of the statute must be made with an evil, wanton, or malicious intent. It requires no more than that the failure be shown to have been intentional. As is said in *Odin Coal Co. v. Denman*, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192: "There was no evil intent operating to produce the failure, but that intent is not a necessary ingredient of willfulness within the correct meaning of the word 'willful' as employed in this statute. . . . An act consciously omitted is willfully omitted in the meaning of the word 'willful,' as used in these enactments of our legislature relative to the duty of mine owners": See to the same effect, *O'Fallon Coal Co. v. Loquet*, 89 Ill. App. 13; *Carterville Coal Co. v. Abbot*, 181 Ill. 495, 55 N. E. 131; *Himrod Coal Co. v. Schroath*, 91 Ill. App. 234; *Girard Coal Co. v. Wiggins*, 52 Ill. App. 59.

b. Various Provisions of.

1. Props and Timbering.—One of the chief, and perhaps the greatest, danger connected with the business of mining is that necessarily incident to any work which must be performed under overhanging masses of rock and earth. In nearly all of the states, therefore, in which mining plays any important part, statutes have been passed with reference to the duty of the mine owner and of his employes to timber the mine. The provisions of these statutes are strikingly similar, the effort of all being to impose upon the mine owner the duty of supplying sufficient timbers and props to properly support the roof, while upon the miner himself is laid the obligation of rendering safe the places under his control. Thus, the statute of Missouri, which is a type of this class of legislation, provides that "the owner, agent or operator of any mine shall keep a sufficient supply of timber, when required, to be used as props, so that the workmen may at all times be able to properly secure the said workings from caving in, and it shall be the duty of the owner, agent, or operator to send down all such props when required."

Under statutes very similar to this it is held that the mine owner is under no statutory duty to prop the roof of the mine. The duty imposed by the statute is merely that of supplying sufficient timbers: Consolidated Coal Co. v. Carson, 66 Ill. App. 434; Consolidated Coal Co. v. Yung, 24 Ill. App. 255; Consolidated Coal Co. v. Scheller, 42 Ill. App. 619. In some states this is expressly provided for by the statute in so many words compelling the workmen to timber the mine: Victor Coal Co. v. Muir, 20 Colo. 320, 46 Am. St. Rep. 299, 38 Pac. 378; Oleson v. Maple Grove Coal etc. Co. (Iowa, Oct. 1901), 87 N. W. 736; Corson v. Coal Hill Coal Co., 101 Iowa, 224, 70 N. W. 185; Ashland Coal Co. v. Wallace, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207; Consolidated Coal etc. Co. v. Clay, 51 Ohio St. 542, 38 N. E. 610; Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N. E. 725; Wellston Coal Co. v. Smith (principal case), 65 Ohio St. 70, 61 N. E. 143. Even under these last-mentioned statutes, however, the duty of the miner or other employé to prop only applies to places under his control, as, for instance, the room in which he is working: Consolidated Coal Co. v. Clay, 51 Ohio St. 542, 38 N. E. 610. As to the entries, passageways, etc., of the mine and those places over which the miner exercises no control, the master is still bound to furnish a safe place, and if timbering be reasonably necessary to make such places safe, it is the duty of the mine owner, and not of his employé, to take this precaution: Wellston Coal Co. v. Smith (principal case), 65 Ohio St. 70, 61 N. E. 143. Moreover, the mine owner may himself assume the duty which the statute would otherwise impose upon the employés. This he does when he appoints a timberman to tend to the proper support of the mine roof, and by such appointment he relieves the miner of his duty to prop the roof: Consolidated Coal Co. v. Scheiber, 167 Ill. 539, 47 N. E. 1052, affirming 65 Ill. App. 304; Consolidated Coal Co. v. Bokamp, 181 Ill. 9, 54 N. E. 567, affirming 75 Ill. App. 605; Consolidated Coal Co. v. Scheller, 42 Ill. App. 619. See for cases other than those above cited, in which statutes relating to the timbering of mines were considered, the following: Sugar Creek Coal Min. Co. v. Peterson, 177 Ill. 324, 52 N. E. 475, reversing 75 Ill. App. 631; Mt. Olive etc. Coal Co. v. Herbeck, 190 Ill. 39, 60 N. E. 105, affirming 92 Ill. App. 44; Western etc. Coal Co. v. Beaver, 192 Ill. 333, 61 N. E. 335; Kellyville Coal Co. v. Petroytis, 95 Ill. App. 635; Donk Bros. Coal Co. v. Peton, 192 Ill. 41, 61 N. E. 330; Hochstettler v. Mosier Coal etc. Co., 8 Ind. App. 442, 35 N. E. 927; Cherokee etc. Co. v. Britton, 3 Kan. App. 292, 45 Pac. 100; Adams v. Kansas etc. Coal Co., 85 Mo. App. 486; Leslie v. Rich Hill Coal Min. Co., 110 Mo. 31, 19 S. W. 308.

2. Ventilation.—The importance of ventilation to the health and safety of those employed in mines, especially to those engaged in coal mining, has led to the enactment of statutes in nearly all of the states in which coal is mined, providing for the proper ventilation of such mines. In most of these statutes the number of cubic feet of air per unit of time, with reference to the number of

men employed in the mine, is prescribed. In others the statute prescribes in minute detail the appliances which the mine owner is required to employ to satisfy the law in this regard.

In the absence of knowledge to the contrary, the miner is entitled to assume that his employer has done his duty as to ventilating the mine: *Mosgrove v. Zimbleman Coal Co.*, 110 Iowa, 169, 81 N. W. 227. Where, however, he has knowledge of the mine owner's failure to do so, if he remains in the service, he assumes the risk arising from such failure: *Graham v. Newburgh Orrel etc. Coke Co.*, 38 W. Va. 273, 18 S. E. 584. See, generally, for cases involving statutes regulating the ventilation of mines, the following cases: *Muddy Valley etc. Min. Co. v. Phillips*, 39 Ill. App. 376; *Godfrey v. Beattyville Coal Co.*, 101 Ky. 339, 41 S. W. 10; *Lenk v. Kansas etc. Coal Co.*, 80 Mo. App. 374; *Cerrillos Coal Co. v. Deserant*, 9 N. Mex. 49, 49 Pac. 807; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *Commonwealth v. Bonnell*, 8 Phila. 534; *Costa v. Pacific Coast Co.* (Wash., Sept. 1901), 66 Pac. 398; *Sommer v. Carbon Hill Coal Co.*, 89 Fed. 54, 32 C. C. A. 156; *Deserant v. Cerrillos Coal Co.*, 178 U. S. 409, 20 S. Ct. Rep. 967, reversing 9 N. Mex. 495, 55 Pac. 290; *Hall v. Hopwood*, 49 L. T., N. S., 797; *Brough v. Humphrey*, L. R. 3 Q. B. 771; *Knowles v. Dickenson*, 2 El. & B. 705, 6 Jur., N. S., 678, 8 Week. Rep. 411.

3. **Escapement Shafts.**—By the mining statutes of many states the owner of a mine is required to construct outlets, or "escapement shafts," separate and distinct from the shafts or slopes by which ore is brought to the surface. These outlets are intended for ingress and egress in case of emergency, and a right of action is ordinarily given those dependent on any employé whose death is caused by the willful failure of the mine owner to adopt this precaution.

Under an Illinois statute of this kind, a mining company was held liable for the willful failure to provide such an outlet, although the fire which gave rise to the emergency was entirely of accidental origin, the court saying: "The statute was intended to provide against just such unavoidable accidents in mines, in which many valuable lives had been lost. The company confessedly had failed to construct the escapement shaft required by the statute, and, confessedly, with a full knowledge of the want of any second mode of escape from that vein, continued to work more than fifteen men in that vein. This renders the appellant liable for all direct damages sustained by reason of the want of this second mode of escape." And the death of a miner was in this same case held to be the direct consequence of the mine owner's failure in this regard, even though it appeared that had he remained where he was there would have been no danger: *Wesley City Coal Co. v. Healer*, 84 Ill. 126. See, also, in this connection the following cases: *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131, affirming 81 Ill. App. 279; *Hamilton v. State*, 102 Ill. 367; *Szotak v. Berwind White Min. Co.*, 36 Misc. Rep. 98, 72 N. Y. Supp. 647.

4. **Hoisting Machinery.**—The rendering safe the machinery and cages by which employes are lowered into and drawn from mines is an end to which a considerable amount of this class of legislation has been devoted. In some statutes the machinery required is minutely described. The most frequent provisions, however, are those which require that the cage be covered, that the machinery be provided with brakes and catches to prevent the fall of the cages, should the cable by which they are held break, and that proper and sufficient means of signaling between the top and bottom of the shaft be provided.

In construing statutes of this kind, and, indeed, in the construction of all those passed for the protection and safety of miners, the courts have adopted a most liberal construction. Thus, where an Illinois statute provided that the owner of a coal mine operated by a shaft should provide "a sufficient brake on every drum to prevent accident in case of the giving out or breaking of the machinery," it was held that an action could be maintained for the failure to provide such a brake whenever, if provided, it would have averted the accident, even though the machinery did not actually break or "give out": *Beard v. Skeldon*, 13 Ill. App. 54, affirmed in 113 Ill. 584. So where a statute provided that the mine owner shall furnish "safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe as far as possible persons descending into and ascending out of such shaft," the statute was construed as intended for the protection of all who were at work in the mine, and not merely for those ascending or descending the shaft at the time of the injury to them: *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654, 58 N. E. 856; *Durant v. Lexington Coal Co.*, 97 Mo. 62, 10 S. W. 484. The reason for this view is well expressed in the Missouri case, in which the court, after citing the familiar rule of construction that the intent of a statute is to be gathered, not from detached portions, but from the act as a whole, with a view to its general scope and purpose, continues as follows: "The statute in question, in its many provisions, seeks to protect the health and safety of persons employed in and about mines, and whilst going in and out of them. This is its general scope and purpose, and to that end many detailed provisions and regulations are made. . . . These regulations are for the protection of persons while at work in the shaft as well as when going up and down. . . . The employe when at work in the cage is as much within the reason and intention of the statute as when going in and out of the mine, and we conclude is entitled to the protection of the covering."

In Illinois, as already noted (*supra*, p. 586), contributory negligence is not accepted as a defense to an action grounded on the failure of the mine owner to carry out the provisions of statutes of this nature. Even in that state, however, where the party injured or killed is himself the agent of the owner, and, as such, it was his duty to provide the appliances required by the statute, there can

be no recovery if by reason of his failure to perform his duty in this regard the accident occurred. The same rule which prohibits a party from recovery where, in order to make out his claim, he must show an illegal act on his part, is held to apply where he has himself failed to perform a duty imposed upon him by the statute: *Beaucoup Coal Co. v. Cooper*, 12 Ill. App. 373. See, generally, for cases involving statutory provisions as to this class, *Girard Coal Co. v. Wiggins*, 52 Ill. App. 69; *Consolidated Coal Co. v. Maehl*, 130 Ill. 551, 22 N. E. 715; *Peel v. Rich Hill Coal Co.*, 23 Mo. App. 216; *State v. Anaconda Copper Min. Co.*, 23 Mont. 498, 59 Pac. 854; *Commonwealth v. Elk Hill Coal etc. Co.*, 4 Lack. Leg. N. (Pa.), 80.

5. "Mine Boss."

A. Liability of Mine Owner for Negligence of.—One of the provisions most frequently met with in this class of statutes is that which requires of the mine owner the employment of a competent mine boss or foreman. In some states none but a person whose competence is certified to by a board of examiners is permitted to act in this capacity. The duties imposed upon him vary, of course, with the statutes of each state. In the main, however, they are much the same in all, and ordinarily require of him that he inspect and carefully watch the ventilation, airways, passageways, machinery, drainage, and timbering of the mine. To a large extent he is required to perform the mine owner's duty of providing a safe place and safe appliances for the use of the latter's employés.

Under statutes of this kind making it compulsory upon the mine owner to employ a competent mine boss, the duty of the master, it is held in some states, ceases when he has fulfilled the requirements of the statute. Under this view, if he has used due care in the selection of a competent foreman, his liability is at an end, and he is not responsible for any injury which may be caused by the negligence of such employé. The foreman is held to be a fellow-servant with the miners under him, and his negligence is deemed to be one of the risks assumed by the latter upon their entrance into the service of the mine owner. The employment of the mine boss is compulsory upon the mine owner; he has no choice nor discretion in the matter, and cannot, therefore (according to one line of cases), be held responsible for the negligence of a servant, the employment of whom is compelled by statute, and whose duties are prescribed, not by the mine owner, but by statute. "The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so he has discharged his duties to his employés in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss, who is not a vice-principal, as his duties are not delegated to him by his employer, but are prescribed by statute, and he is a fellow-servant, as in case of injury to other employés through his negligence, the master is not responsible":

Williams v. Thacker Coal Co., 44 W. Va. 599, 30 S. E. 107. And to the same effect are Colorado Coal etc. Co. v. Lamb, 6 Colo. App. 255, 40 Pac. 251; Delaware etc. Canal Co. v. Carroll, 89 Pa. St. 374; Reese v. Biddle, 112 Pa. St. 72, 3 Atl. 813; Waddell v. Simoson, 112 Pa. St. 567, 4 Atl. 725; Redstone Coke Co. v. Roby, 115 Pa. St. 364, 8 Atl. 593; Lineoski v. Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577; Mulhern v. Lehigh Valley Coal Co., 161 Pa. St. 270, 28 Atl. 1087, 1088; Howells v. Landore-Siemens Steel Co., 44 L. J. Q. B. 25, L. R. 10 Q. B. 62. Indeed, it is held in Durkin v. Kingston Coal Co., 171 Pa. St. 193, 50 Am. St. Rep. 801, 33 Atl. 237, that a statute which requires the owner of mines to employ no foremen other than those certified as competent by a board of examiners, and prescribing the duties of such foremen, is unconstitutional and void, if it at the same time attempts to make the mine owner liable for the failure of the foreman to properly discharge his duties. The court, speaking through Williams, J., uses the following language: "Under the operation of this statute, the mine foreman represents the commonwealth. The state insists on his employment by the mine owner, and in name of the police power turns over to him the determination of all questions relating to the comfort and the security of the miners, and invests him with the power to compel compliance with his directions. Incredible as it may seem, obedience on the part of the mine owner does not protect him, but if the mine foreman fails to do properly what the statute directs him to do, the mine owner is declared to be responsible for all the consequences of the incompetency of the representatives of the state. This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame and for the fault of another."

The authorities are, however, by no means in harmony upon this question, and in some states the mine owner is held liable for the negligence of his foreman, even though the employment of the latter is made compulsory by the statute. Thus, in Indiana, where the statute requires that the mine owner employ a mine boss, and prescribes the duties of the latter, making the mine owner liable "for any injury to person or property occasioned by any violation of the provisions of the act," the mine owner was held properly chargeable with the negligence of the mine boss, the court saying: "The purpose of the statute was to provide an additional safeguard against injury to employes in mines by requiring the operator of the mine through the mining boss to give special attention to the safety of the mine as a working place. It was not intended to absolve the owner or operator from liability when he employed a competent mining boss and delegated the duty to him of making safe the place where he required his employes to work. . . . The gist of the action is not the failure to employ a competent mine boss, but grows out of the failure of the employer to discharge the duties

resting on him in relation to providing a safe working place for appellee. This duty appellant could not, in our opinion, by virtue of the provisions of the statute, delegate to the mine boss so as to escape liability on account of the failure to perform the acts therein required. The statute prescribes the care which the employer is required to exercise. The employment of a competent mine boss is not the exercise of this care. The failure of the boss to perform the duties designated in the statute is, under the statute, the negligence of the master. Aside from the statute, each paragraph of the complaint states a good cause of action. In other words, the statute was not intended to lessen the duties of the master, but was intended to increase his duty to the extent of requiring him to employ a mining boss to give special attention to the condition of the mine. It was not contemplated, however, when the mining boss was employed that such employment should relieve or exempt the master from liability": *Linton Coal etc. Co. v. Person*, 11 Ind. App. 264, 39 N. E. 214. And for cases taking the same view, see *Eureka Block Coal Co. v. Wells* (Ind. App., Oct. 1901), 61 N. E. 236; *Cherokee etc. Co. v. Britton*, 3 Kan. App. 292, 45 Pac. 100.

Even where the view is taken that the mining boss, when appointed in accordance with the statute, is a fellow-servant of the miner, and the mine owner is not responsible for the negligence of such mine boss, the doctrine is applied only when the boss is given no duties not laid upon him by the statute. Under the statute it is no part of the duties of a mine boss to employ and discharge men, and if such authority is given him by the mine owner, the foreman becomes the representative of the owner, and the latter is chargeable with the boss' negligence: *Weaver v. Iselin*, 161 Pa. 386, 29 Atl. 49.

B. Effect of Certificate of Competence.—Where a statute requires that no person shall act as mine boss, or as hoisting engineer, unless his competence shall be certified to by a board of examiners created by the statute, this certificate of competency is, it is held, not conclusive. It goes no further than to say that the bearer at the time the certificate was issued had the technical knowledge and skill necessary to do the work required of him. His care and reliability in other respects are not covered by such a certificate, and as to these the mine owner is required to use all reasonable care to determine the competence of such employés. Referring to a statute of this nature, the supreme court of Illinois uses the following language: "It is argued that by this statute the law has provided the only means by which a hoisting engineer's abilities can be ascertained, and that the efficacy of the certificate for that purpose cannot be disputed. While the law required defendant to select its engineer from a certain class, it did not make it obligatory upon it to employ Rasor or to retain him in its employment. It would not have been a violation of any law to have discharged him if he was found to be incompetent. If defendant had been compelled to

employ him, there would, of course, be no element of negligence on its part in doing so, and it could not be held liable for a violation of the law on account of his unfitness. Such a certificate does not conclusively establish the competency of the person, but may be considered with other evidence upon that question": Consolidated Coal Co. v. Seniger, 179 Ill. 370, 52 N. E. 733, affirming 79 Ill. App. 456. See, however, Durkin v. Kingston Coal Co., 171 Pa. St. 193, 50 Am. St. Rep. 801, 33 Atl. 237.

6. Inspection.—A quite frequent provision is that requiring inspection of the workings of the mine, daily or at other regular intervals, and providing for recovery of damages by those dependent on any person who shall be killed by reason of the willful failure of the mine owner to make this inspection. In order that this right of action accrue, however, it must appear that the inspection, if made according to statute, would have discovered the defect which caused the injury: Missouri etc. Coal Co. v. Schwalb, 74 Ill. App. 567. If an inspection is made, and the defect is not discovered, even though it may have existed at the time of the inspection, there is in such case no "willful" violation of the statute, and the mine owner will not be held liable; Himrod Coal Co. v. Schroath, 91 Ill. App. 234. See, also, Coal Run Coal Co. v. Jones, 6 West. Rep. 500, reversing 19 Ill. App. 365.

7. Miscellaneous.—The more important statutory provisions for the protection and safety of miners have already been considered. In the statutes of the various states, however, there are numerous provisions prescribing in detail the precautions and appliances which the mine owner is required to employ to prevent injury to his servants. These have engaged the attention of the courts but little, and their number and variety, moreover, prevent any extended consideration of them in this place. See, however, as to statutes requiring the fencing of mine shafts, Catlett v. Young, 143 Ill. 74, 32 N. E. 447; Bartlett Coal Co. v. Roach, 68 Ill. 174; Brazil etc. Coal Co. v. Hoodlet, 129 Ind. 327, 27 N. E. 741; Spiva v. Coal Co., 88 Mo. 68; requiring the employment of "shot firers"; State v. Murlin, 137 Mo. 297, 38 S. W. 923; prohibiting the employment of children: Queen v. Dayton Coal Co., 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460; requiring proper means of signaling and places of refuge in passageway: Sangamon Coal Co. v. Wiggerhaus, 122 Ill. 279, 13 N. E. 648; requiring employment of competent engineer at hoist: Niantic Coal Co. v. Leonard, 126 Ill. 216, 19 N. E. 294; Consolidated Coal Co. v. Maehl, 130 Ill. 551, 22 N. E. 715; and requiring a passageway around the bottom of the shaft: Rush v. Coal Bluff Min. Co., 131 Ind. 135, 30 N. E. 904.

OHIO FARMERS' INSURANCE COMPANY v. BURGET.

[65 Ohio St. 119, 61 N. E. 712.]

INSURANCE—REMOVAL OF PROPERTY.—A condition that a policy insuring against loss by fire is to become void if any change takes place in the location of the property does not, on its breach, render the policy absolutely void, so that no recovery can be had thereon if a loss subsequently occurs at another place to which the insurer had stipulated that removal might be made, though, when so stipulating, he had no knowledge of the previous removal. (p. 598.)

Action upon a policy insuring certain chattels against loss by fire. When insured, they were situate at 363 Prospect street, Cleveland. The policy issued November 23, 1895, declared that it should "become void unless consent in writing is indorsed by the company hereon in each of the following instances: If any change takes place in the location of the property." About February 1, 1896, the insured removed to Huron street, taking the property with her. On the 3d of the same month she removed with such property to Winchester avenue, in the same city, and obtained the consent of the insurer to such removal, without informing it of any previous change of location. On the day following the property was destroyed by fire at the place to which it had been removed pursuant to such consent. Verdict for the plaintiff on the instruction of the trial court, which was subsequently affirmed by the circuit court on appeal.

Lee Elliott and Hile & Horner, for the plaintiff in error.

Hart, Canfield & Callaghan and Dyer, Williams & Stouffer, for the defendant in error.

122 SHAUCK, J. The sound propositions advanced by counsel for the insurance company must be unavailing if the following is unsound: The removal of the property insured from Prospect street to Huron street without the consent of the company rendered the policy wholly void for its entire term, and incapable of further operation except by the subsequent consent of the company with knowledge of that removal. The scope and materiality of this proposition appear from the considerations that the chattels were not destroyed at the residence on Huron street, to which they were removed without the company's consent, but later at the residence on Winchester avenue to which they were removed with its consent;

and that when it gave such consent it had no knowledge of the previous removal to Huron street.

A change in the location of insured chattels may increase the hazard or it may diminish it, but the insurer is not required to leave the question of increased hazard to be tried as a matter of defense after a loss. It may by the stipulations of its contract reserve the right to decide that question for itself and to decide it conclusively. That right was exercised by the insurer in this case by the stipulation that the policy should become void if, without its consent, there should be a change in the location of the property. ¹²³ The stipulation is conclusive, but the duration of the avoidance of the policy for which it provides is to be determined by the intention of the parties, as that is evinced by the subject and terms of the contract. A like conclusive character attaches to other stipulations of insurance policies by which the insurer secures exemption from liability. The condition that the policy shall be void if the house which is the subject of insurance should "be vacated or left unoccupied" when broken, was held to be determinative of the rights of the parties and to exempt the insurer from liability, the loss occurring during vacancy: Insurance Co. v. Wells, 42 Ohio St. 519. The same view has been taken of stipulations against liability in cases of the alienation of the title of the insured, of other insurance, of forbidden liens, of increased hazard from repairs, of the insured property being used in violation of law, of a ship navigating forbidden waters, of the use of the property for more hazardous purposes, of lighting with gasoline, and other like conditions. With respect to all of the conditions enumerated, it has been considerably held that the avoidance intended by the stipulation is during, and only during, the existence of the forbidden hazard: United States etc. Ins. Co. of Baltimore v. Kimberly, 34 Md. 224, 6 Am. Rep. 325; Insurance Co. of Des Moines v. Schreck, 27 Neb. 527, 20 Am. St. Rep. 696, 43 N. W. 340; Mutual Fire Ins. Co. v. Coatesville Shoe Factory, 80 Pa. St. 407; Obermeyer v. Globe Mut. Ins. Co., 43 Mo. 573; Hinckley v. Germania Fire Ins. Co., 140 Mass. 38, 54 Am. Rep. 445, 1 N. E. 737; Worthington v. Bearse, 12 Allen, 382, 90 Am. Dec. 152; Lane v. Maine Mut. Fire Ins. Co., 12 Me. 44, 28 Am. Dec. 150. There are numerous other decisions of like import, but these are sufficient for present purposes.

¹²⁴ The cases upon the subject have been collected by Mr. Joyce, in a note to section 2239 of his work on Insurance. Some of them are plainly irreconcilable with the view above stated. They are entitled to the most respectful consideration, because they are supposed to pay the greatest possible deference to the terms of the contract into which the parties have entered, and to administer merited rebuke to those who would adjudicate with respect to these contracts otherwise than in accordance with the rules generally recognized. They proceed upon the view that to give full effect to the terms used by the parties they must be deemed to have intended that upon any breach of the stipulation against an extrahazard, unless the breach is merely temporary, the contract is terminated, and that it cannot again be put into operation except by some act of the insurer which amounts to a waiver of the defense which was made available by the breach. These cases take no note of the necessity for the construction of such stipulations in view of the variety of senses in which the word "void" is used. They do, however, by the clearest implication admit that the word is not, in such connections, used in its extreme sense; for, if it were so used, the liability of the insurer could not, after the breach, be revived by mere waiver. The necessity for construction is also impliedly admitted in the attempted distinction between such forbidden hazards as are temporary merely and those which are permanent. For that distinction the terms of the contract afford no basis whatever. If the distinction is made, it must be deduced by construction which applies the terms of the contract to its subject; and having regard to the reasonableness of conclusions, every hazard is temporary which is not operative when a loss occurs. ¹²⁵ Any other distinction between temporary and permanent hazards must be arbitrary and quite apart from any supposed intention of the contracting parties.

In this portion of the policy the parties stipulated for the immunity of the insurer from liability on account of losses which might occur during its life. The sole purpose of the stipulation under consideration was to exempt it from liability for a loss which might occur from hazards which it did not have an opportunity to estimate for itself and which it did not contemplate; that is, from hazards not existing at the place where the chattels were when insured, or at another to which they might be removed with its consent. The consent of the insurer to the removal of these chattels to the residence on

Winchester avenue, where they were destroyed, was its election to accept the hazards of that location in lieu of those of their location when the policy was written. The hazards of the location in which the chattels were destroyed were in no wise augmented by the previous removal to Huron street without the consent of the company.

Judgment affirmed.

Minshall, C. J., Williams, Burket and Spear, JJ., concur.

Davis, J., Dissented, on the ground that he could not accept the views of the majority to the effect that "the avoidance intended by the stipulations is only during the existence of the forbidden hazard." He insisted that while this might be the rule in some cases, the stipulation in the policy in the case before the court excluded the application of this rule, that the expression in the stipulation that the policy should become void meant that, upon the violation of the contract, such policy "eo instante becomes absolutely void." He claimed that such was the judgment of the court in *Insurance Co. v. Wells*, 42 Ohio St. 519, and that the same rule had been applied in *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 452, 464, 14 Sup. Ct. Rep. 379; that the policy having become void on the removal of the property from Prospect street to Huron street without the knowledge or consent of the insurers, it could not be renewed or revived, except by waiver or estoppel arising from the acts or statements of the insuring company or its authorized agents, or unless there was an express agreement to revive.

Fire Insurance.—It has been held that when property is insured in a certain place but "not elsewhere," there can be no recovery on the policy if the subject of insurance is destroyed at another place than where insured: See *British-America Assur. Co. v. Miller*, 91 Tex. 414, 66 Am. St. Rep. 901, 44 S. W. 60; *L'Anse v. Fire Assn.*, 119 Mich. 427, 75 Am. St. Rep. 410, 78 N. W. 465; *Farmers' Mutual Fire Assn. v. Kryder*, 5 Ind. App. 430, 51 Am. St. Rep. 284, 31 N. E. 851. But see *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962, 17 Am. St. Rep. 115, 9 S. E. 694; *Hapeman v. Citizens' etc. Ins. Co.*, 126 Mich. 191, 86 Am. St. Rep. 535, 85 N. W. 454.

The Revival of Forfeited Insurance by a discontinuance of the cause of forfeiture before loss is considered in the monographic note to *Born v. Home Ins. Co.*, 80 Am. St. Rep. 305-311.

KINNEAR MANUFACTURING COMPANY v. BEATTY.

[65 Ohio St. 264, 62 N. E. 341.]

PUBLIC STREETS, CLOSING OF.—An abutting lot owner has such an interest in a part of the street on which he abuts that the closing of it up, or the impairment of its use as a means of access, or the addition of a new burden, is a taking of private property for a public use, and cannot be done without compensation. (p. 601.)

PUBLIC STREET, CLOSING OF, WHO MAY COMPLAIN OF.—One who is not an abutter upon the vacated part of a public street, and who has ample means of access to his property by other streets and public ways, is not entitled to an injunction against such vacation or against the erection of a building upon the part of the street vacated. (p. 602.)

PUBLIC STREETS, VACATING OF.—The fact that streets and alleys are represented as such on the plat of an addition to a city, and lots are sold by such plat, does not entitle a lot owner to enjoin the vacation of a part of the street on which his lot does not abut. (p. 604.)

Suit by Julia Beatty to enjoin the erection of a building by the defendant corporation in a part of the city of Columbus which had been a public alley, known as Cedar alley, and was so represented upon plats by which the property in that neighborhood had been sold. She owned lot 63, fronting on Warren street and extending back to this alley, between Hamlet street and Lazelle avenue. The owners of the lots to the east of the plaintiff obtained an order from the municipal authorities closing the alley in front of their property, and the title to the land formerly included within the alley reverted to them. They then opened another alley along the line of their lands and at right angles to Cedar alley, which remained open from this new alley out to Hamlet street, and therefore in front of the plaintiff's lands. The plaintiff's petition was dismissed and she appealed.

Arnold, Morton & Irvine and Watson, Burr & Livesay, for the plaintiffs in error.

W. M. Thompson and Frank T. Clarke, for the defendant in error.

²⁸⁰ **MINSHALL, C. J.** The case involves the right of a property owner in a street or alley, a portion of which, other than the part on which he abuts, has been vacated by the city.

William A. Neil, deceased, having in his lifetime made an addition to the city of Columbus, recorded a plat, with lots,

streets, and alleys indicated thereon as shown by an exhibit to the petition. Afterward the city council vacated a part of one of the alleys, known as Cedar alley, the vacation including the part of the alley between lots 64, 65, 66, and 67 on the north side, and lots 73, 74, 75, and 76 on the south side, of the alley, ²⁸¹ the plaintiff at the time being the owner of lot 63, on which she had erected a building and otherwise improved the same before the vacation. Afterward his trustees made a subdivision of the lots on either side of the vacation, including in the same the vacated portion of the alley, as shown by exhibit "B" to the answer, and dedicated an alley running north and south from Warren street to Lincoln street, on which alley the lot of the plaintiff abuts on its east side, its entire length from Warren street to Cedar alley. The part of the alley south of the plaintiff's lots is not vacated, is intersected by the new alley, and the unvacated portion extends from the new alley on the east to Hamlet street on the west. This dedication was accepted by the city and the subdivision recorded.

Afterward the trustees sold and conveyed the lots in the new subdivision, including the vacated portion of the alley, to the manufacturing company, who was proceeding to construct its building upon it, when the suit was brought. It will be observed that the lot of the plaintiff does not abut upon any portion of the vacated alley; and that she has public access to her lot with its improvements, on the north by a street (the front of her lot); on the east by the new alley, the entire length of the lot; and on the south by the unvacated portion of Cedar alley, the entire width of the lot. In other words, she has public access to her lot on every side but one.

There seems to be no ground for questioning the validity of the proceedings whereby a portion of Cedar alley was vacated by the city council. The regularity of the proceedings is averred in the answer and admitted by the demurrer. Nor is there any for questioning the title of the manufacturing company to the vacated portion of the alley. The trustees owned the property on each side of the vacated portion, ²⁸² and on vacation it reverted to them as the abutting owners, subject to such necessary rights of way as others may have therein: *Stevens v. Shannon*, 6 Ohio C. C. 142, affirmed by this court; *Kerr v. Commissioners*, 51 Ohio St. 593; and the manufacturing company by its purchase acquired all the rights of the trustees in and to the property. The question

then we have to consider is, whether upon the facts admitted by the pleadings, the plaintiff, Mrs. Beatty, has such an interest in the vacated portion of the alley, as a means of ingress and egress to her lot, as entitles her to an injunction against its being so closed or obstructed as to prevent its use by her as a means of access to her property. The decisions in this state have clearly established that an abutting lot owner has such an interest in the portion of the street on which he abuts that the closing of it up, or the impairment of its use as a means of access, or the addition of a new burden, is a taking of private property for a public use, and cannot be done without compensation: *McCombs v. Akron*, 15 Ohio, 474; *Crawford v. Delaware*, 7 Ohio St. 459, *Cincinnati etc. St. Ry. Co. v. Cummins*, 14 Ohio St. 523. The principle of these cases, and they have been frequently followed, applies with like justice and force where a portion of a street is obstructed or vacated, that affords the only reasonable access to the property of an owner, although his property does not abut immediately upon the obstructed portion. Abutting owners on a vacated portion of a street would not have the right, by reason of the vacation, to isolate an owner of property on the unvacated portion. Such an owner would still have an easement, or right of way, over the vacated portion to a point where he could have reasonable access to other public ways: ²⁸³ *McQuigg v. Cullins*, 56 Ohio St. 649, 654, 47 N. E. 595. In this case the vacated portion was the only reasonable means of access which the plaintiff had to his farm, and this fact constituted the ground of the relief granted. But where the party complaining is not an abutter upon the obstructed or vacated portion of a street or way, and has ample means of access to his property by other streets and public ways, a very different case is presented. In such case he is simply one of the general public, suffering an inconvenience common to all; though he may, by reason of proximity, suffer a greater inconvenience than others, he is in no way distinguished from them except in degree. To give the individual a right in such cases to be heard, either in a suit for damages or by injunction, he must aver and show that the injury he suffers is different in kind from that of the general public. This he may do by showing that his easement in the street, as a means of access to his property, is impaired or destroyed. His easement, however, is limited to the portion of the street on which he abuts, or a street which

affords him the only means of access to his property. Where his property is not in physical contact with the vacated portion of the street, and he has other reasonable means of access, the individual has no right of action by which he can enjoin the obstruction or recover damages. The authorities are numerous in support of this proposition: Jones on Easements, secs. 546, 550; Smith v. Boston, 7 Cush. 254; Littler v. City of Lincoln, 106 Ill. 353; Kimball v. Homan, 74 Mich. 699, 42 N. W. 167; Bailey v. Culver, 84 Mo. 531; Jackson v. Jackson, 16 Ohio St. 163; Elliott on Railroads, sec. 1086; Buhl v. Fort St. Union Depot Co., 98 Mich. 596, 57 N. W. 829. The reason is thus stated by Chief Justice Shaw in Quincy Canal v. Newcome, 7 Met. 276, 39 Am. Dec. 780: "Where one ²⁸⁴ suffers in common with all the public, although from his proximity to the obstructed way or otherwise from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such a multiplicity of suits as to be itself an intolerable evil." The general principle is recognized in Jackson v. Jackson, 16 Ohio St. 163, where it is said in the syllabus: "A claimant for damages in the alteration of a road is not entitled to recover where such alteration merely renders the road less convenient for travel, without directly impairing his access to the road from the improvements on his land."

In all the cases in this state, where an owner of land is recognized as having such a property interest in a road or street as entitles him to an action for damages, or to restrain its obstruction, relate to the cases where there was a direct physical connection between the portion of the street interfered with and the land of the complainant, or the part vacated, furnished the only means of access to his property. In the latter case he is regarded as having an easement in the road or street, and its vacation or obstruction, affecting as it does his private rights, the injury to him is regarded as different in kind from that of the public. McQuigg v. Cullins, 56 Ohio St. 649, 47 N. E. 595, is an instance of this kind. Where closing up a portion destroys the owner's easement in the part not closed, and deprives him of any access to his land, the result to him is the same as if the entire way had been closed; and, in such case, he may properly be said to have an easement to his lands in the entire way, though his lands are connected with or abut only upon a part of it. The other cases relate to the instances where, a city having established

a grade, with reference to which the owner has improved his lot, subsequently changes ²⁸⁵ it, making the access to the owner's lot, as improved, less convenient (*Crawford v. Delaware*, 7 Ohio St. 459), or, where, as in *Cincinnati etc. St. Ry. Co. v. Cumminsville*, 14 Ohio St. 523, it is proposed to add a new burden to the street, making access to his property by the abutting owner less convenient. In these and all similar instances the owner is regarded as having an interest in the street in the nature of property, that by "the justice of the constitution" cannot be taken from him against his consent until compensation has been made. It is plain to be seen that the case of the plaintiff falls within the principle of none of these decisions. Her lot is not located upon the vacated portion, and access to it is hardly in any appreciable degree impaired—is, in fact, by the new alley, increased.

We see no good reason for holding, as seems to be contended, that the rule is different as to the streets and alleys of an addition to the plat of a city; that in such case there is an implied covenant that the streets and alleys, indicated on the plat, are to remain open for public use, and that each owner of a lot in the addition may insist on this covenant. In our view the streets and alleys of every addition to a city become a part of its general system of public ways, over which the city through its council and other agents has the same control that it has over each and every part of the system; and that the rights of lot owners in the addition to the use of the streets and alleys, indicated on the recorded plat, are the same, but not greater, than are the rights of any lot owner upon a street or alley.

We are cited to some cases which seem to hold that the right of a lot owner, in case of vacation, to the use of the street upon which he abuts, extends to the next intersecting street. This would be so, consistently with what has heretofore been said, if without such ²⁸⁶ extension his property would be substantially isolated; otherwise we see no reason whatever for such a claim.

The provision in section 2654 of the Revised Statutes, that where a street or alley is vacated by a city council, "the right of way of any lot owner shall not be impaired thereby," creates no new right—it simply preserves such right as the lot owner had in the street or alley by existing law. These have already been adverted to in this opinion. They are such rights as the owner has in the portion of the street on which

his property abuts, or may have in the street as the only reasonable access to his property. The provision was doubtless inserted to avoid the possible contention that under the power conferred such rights might be destroyed by its exercise. But such rights would have been preserved without this provision, as it would not have been in the power of the legislature to have authorized the city council to destroy vested rights.

The judgment of the circuit court is reversed, and that of the common pleas affirmed.

Williams, Burket, Spear, Davis and Shauck, JJ., concur.

Public Streets cannot be Burdened with any additional servitude, other than that which properly and legitimately attaches to them as public streets and highways, without just compensation to the abutting lot owners: *Brand v. Multnomah County*, 38 Or. 79, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209. A municipal corporation is liable to an abutting lot owner caused by excavating the street: *Eachus v. Los Angeles*, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829. Compare *Brand v. Multnomah County*, 38 Or. 79, 84 Am. St. Rep. 772, 60 Pac. 390, 62 Pac. 209; and see the monographic note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 835-850. Municipalities have no inherent power to vacate a street or any part of it: *Texarkana v. Leach*, 66 Ark. 40, 74 Am. St. Rep. 68, 48 S. W. 807. And damages may be recovered, in a proper case, by property owners for the vacation of a street; but they are not entitled to an injunction, unless they have a special interest in the street and their property will be directly injured by the vacation: See the monographic note to *Heinrich v. St. Louis*, 46 Am. St. Rep. 493-498.

STATE v. GRAVETT.

[65 Ohio St. 289, 62 N. E. 325.]

PRACTICE OF MEDICINE—OSTEOPATHY, STATUTES WHICH APPLY TO.—A statute directed against any person who practices, or recommends for a fee, the use of any drug, medicine, appliance, application, operation, or treatment, of whatever nature, for the cure or relief of any wound, fracture, or bodily injury, infirmity, or disease, applies to persons practicing osteopathy. (p. 607.)

CONSTITUTIONAL LAW.—THE RIGHT TO CONTINUE TO PRACTICE A CALLING OR PROFESSION is subject, where the pursuit concerns in a direct manner the public health and welfare, and is of such a character as to require a special course of study, training, or experience to qualify one to pursue it with safety to the public interest, to the power of the legislature to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance. (p. 608.)

CONSTITUTIONAL LAW—OSTEOPATHY, FORBIDDEN DISCRIMINATION AGAINST THE PRACTICE OF.—There is no authority to discriminate against any school of medicine. A statute requiring persons who practice osteopathy to hold a diploma from a regularly chartered and legally constituted school, wherein a course of instruction requires at least four terms of five months each, in four separate years, and also to pass an examination satisfactory to the medical board of registration on specified subjects, but which does not require a like duration of study of persons practicing the regular school of medicine, nor any requirement concerning the school itself, except that it be a legally chartered medical institution in good standing, undertakes to impose an unreasonable discrimination, and is therefore void. (p. 609.)

Indictment for practicing osteopathy without complying with the statute referred to in the opinion of the court. A demurrer to the indictment was sustained by the court of common pleas of Darke county, to which the prosecution excepted.

J. M. Sheets, attorney general, J. E. Todd, assistant attorney general, A. L. Clark, prosecuting attorney, R. E. Westfall, Smith E. Bennett, and H. J. Booth, for the plaintiff.

Addison F. Broomhall and Anderson & Bowman, for the defendant.

306 SHAUCK, J. It is said that the decision of the court below is justified by *State v. Liffing*, 61 Ohio St. 39, 70 Am. St. Rep. 358, 55 N. E. 168, the act charged in the indictment not being an offense within the terms of the statute. The practice which was there charged as unlawful is the same as that charged in the present indictment. By the statute then in force one was regarded as practicing medicine who should "for a fee prescribe, direct, or recommend for the use of any person, any drug or medicine, or other agency for the treatment, cure, or relief of any wound, fracture, or bodily injury, infirmity, or disease." The view then urged by the attorney general was that the system of rubbing or kneading the body known as osteopathy, is an "agency" within the meaning of the statute; but the interpretation of the statute seemed to invoke the maxim "*Noscitur a sociis*" as an aid in determining the meaning of the word, and our conclusion was that it meant something of like character with a drug or medicine to be administered with a view to producing effects by virtue of its own potency, and that it therefore did not include osteopathy.

But since our decision in that case, by the act of April 14, 1900, the section (4403f) has been amended, and a more com-

prehensive definition given of the practice regulated, so that one is now regarded as practicing medicine within the meaning of the act ³⁰⁷ "who shall prescribe, or who shall recommend for a fee for like use, any drug or medicine, appliance, application, operation, or treatment, of whatever nature, for the cure or relief of any wound, fracture, or bodily injury, infirmity, or disease." The amended act further contains a proviso to prevent its application "to any osteopath who holds a diploma from a legally chartered and regularly conducted school of osteopathy, in good standing as such, wherein the course of instruction requires at least four terms of five months each in four separate years, providing that such osteopath shall pass an examination satisfactory to the state board of medical registration and examination on the following subjects: Anatomy, physiology, chemistry, and physical diagnosis. Provided that such osteopath shall not be granted the privilege of administering drugs nor of performing major or operative surgery."

It seems quite clear that in its present form the statute affords no proper occasion for the application of the maxim of interpretation by which we were aided in *State v. Liffing*, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168. Careful comparison of the two acts with respect to their definitions of the practice regulated shows that while in the former the legislature intended to prohibit the administration of drugs by persons not informed as to their effect or potency, by the latter it has attempted a comprehensive regulation of the practice of the healing art, so far, at least, as to require the preparatory education of those who, for compensation, practice it according to any of its theories. The comprehensive language of the statute and the purpose which it clearly indicates require the conclusion that osteopathy is within the practice now regulated.

In support of the decision of the court of common pleas it is further contended that if the act includes ³⁰⁸ the practice of osteopathy, it is to that extent void on constitutional grounds. From this point of view it is urged that the defendant has an established practice as an osteopathist, and that the statute is void because it contains no provision saving his vested right therein. This objection is founded on the inhibition of the fourteenth amendment to the constitution of the United States: "Nor shall any state deprive any person of life, liberty, or property without due process of law,

nor deny to any person within its jurisdiction the equal protection of the laws"; and the provision of our own bill of rights which gives inviolability to the rights of "enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking to obtain happiness and safety." In urging this objection it is correctly assumed that there is a property interest in a vocation or means of livelihood, but the distinction between the right to establish a practice and the right to pursue a practice already established seems to be inadmissible. By what process of reasoning could it be maintained that the right to enjoy property should be esteemed more sacred than the right to make contracts by which property might be acquired? The provision quoted from the bill of rights includes the right to acquire, and the right to possess within the same protection. Our constitutions are founded upon individualism, and they make prominent the theory that to the individual should be granted all the rights consistent with public safety; and our development is chiefly attributable to the firm establishment and maintenance of those rights by an authorized resort to the courts for their protection against all hostile legislation which is not required by considerations of the public health or safety. In the absence of such ³⁰⁹ considerations those rights are alike immutable; in their presence they must alike yield. In this connection counsel for the defendant call our attention to *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 136, a case which should not be referred to without approval. But it is there held that "where the pursuit concerns in a direct manner the public health and welfare, and is of such a character as to require a special course of study or training, or experience, to qualify one to pursue such occupation with safety to the public interests, it is within the competency of the general assembly to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance."

In the enactment of legislation of this character the general assembly may take account of the advance of learning, and provide for the public health and safety by such reasonable and proper measures as increased knowledge may suggest; and, to make such legislation effective, one having an established practice, and one contemplating practicing, may be required to conform to the same standard of qualification. This conclusion seems to be justified by the considerations

involved, as it is by the authority of *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 136, and *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. Rep. 231.

It is further urged against the validity of the statute in its application to osteopaths that to their admission to practice it prescribes conditions with which compliance is impossible, and that it is therefore an attempt, by indirect means, to prohibit practice according to their theories. In this connection our attention is called to the provision of section 4403c, which, as to those contemplating practicing in other schools, requires that the applicant for a certificate ³¹⁰ "shall be examined in materia medica and therapeutics, and the principles and practice of medicine of the school of medicine in which he desires to practice by a member or members of the board representing such school"; and to the fact that there is no member of the board representing the school of osteopathy. It could not be maintained, and we do not understand counsel to contend, that the board of medical examination must be so numerous a body that it may have a member of every existing or possible school. The insistence is that, however few or numerous the members of the board may be, the act must contain practicable provisions for ascertaining the attainments of all who apply for certificates, they being in other respects qualified. Such provisions, it is insisted, are not contained either in that section or in the proviso of section 4403f, which relates especially to osteopaths, for it is there provided that an applicant shall hold "a diploma from a legally chartered and regularly conducted school of osteopathy in good standing as such, wherein the course of instruction requires at least four terms of five months each in four separate years," and it is said that there is no school of osteopathy whose requirements exceed two years.

The question before us arises on demurrer to the indictment, and the record does not inform us of the fact that there is no school of osteopathy whose diploma would admit its holder to an examination. However well known it may be to those who have sought information concerning it, we are perhaps without such information as would justify us in regarding it as a fact to be considered in the case.

But a sufficient foundation for this criticism of the act appears in its provisions discriminating against ³¹¹ those who propose to practice in the school to which the defendant be-

longs. The proviso quoted contains a list of subjects upon which those desiring to practice are to be examined. Having in view the theories of the osteopaths as they are commonly understood, it seems clear that no adverse criticism could be made upon the discretion exercised in the requirement of these subjects for examination. They are much less numerous and extensive than those prescribed for applicants who contemplate a regular practice, and an appropriate limitation is placed upon the effect of certificates following such limited examination. But one who desires to practice in the regular school is admitted to a more extensive examination without any requirements as to duration of study in the college whose diploma he holds, and without any requirement in that regard, except that it shall be a "legally chartered medical institution in the United States in good standing at the time of issuing such diploma, as defined by the board." Why the exaction of four years of study should be made of those only who are to take a shorter examination, and receive a certificate of limited effect, we need not inquire. It is quite obvious that this additional requirement could not have been made of those contemplating the practice of osteopathy because of the number and character of the subjects upon which they are to be examined, nor of the effect of their certificates, nor because of any consideration affecting the public health or safety which does not involve a scientific conclusion adverse to the efficacy of osteopathy. A conclusion of that character cannot be drawn by a body to which legislative power alone is given, and for whose members there is no prescribed qualification of education, knowledge, or intelligence. ³¹² Authority to discriminate against osteopathy would imply authority to discriminate against any other school of medicine. It seems clear from the reasons involved, and from the discussion of the subject, and the points decided in *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785, 51 N. E. 136, that this discrimination against those who occupy the position of the defendant is unwarrantable, and that compliance with it cannot be required.

The question lastly considered would dispose of the exception, but the other questions are in the record, and they have been ably discussed by counsel. It seemed proper to pass upon them to the end that the general assembly may not meet any unnecessary difficulty in the exercise of its ample power to protect the public health and welfare by providing

that only the learned may pursue a learned profession whose activities so closely affect them.

Exception overruled.

Minshall, C. J., Williams, Burket, Spear, and Davis, JJ., concur.

One Practicing Osteopathy does not practice medicine in contravention of a statute that forbids anyone, without a certificate of qualification, to prescribe "any drug, medicine, or other agency" for the treatment of disease: *State v. Liffing*, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168.

Regulation of Profession.—The power of the legislature to prescribe such reasonable conditions as are calculated to exclude those who are unfitted to discharge their professional duties is large and comprehensive, and cannot be doubted: *State v. Randolph*, 23 Or. 74, 37 Am. St. Rep. 655, 31 Pac. 201. But a statute regulating the practice of a profession, which discriminates against certain persons or classes of persons engaged therein, is unconstitutional: *State v. Hinman*, 65 N. H. 103, 23 Am. St. Rep. 22, 18 Atl. 194. See, also, *Noel v. People*, 187 Ill. 587, 79 Am. St. Rep. 238, 58 N. E. 616.

KULP v. FLEMING.

[65 Ohio St. 321, 62 N. E. 334.]

CORPORATION.—A CONSTITUTIONAL PROVISION IS NOT SELF-EXECUTING which declares that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." (p. 612.)

CORPORATIONS — STATUTE CREATING LIABILITY AGAINST STOCKHOLDERS.—If the constitution of the state declares that dues from corporations shall be secured by the individual liability of stockholders to an additional amount equal to the stock owned by them, a state statute providing that "no stockholders shall be liable to pay debts of a corporation beyond the amount due on his stock and an additional amount equal to the stock owned by him," must be interpreted as intended to comply with the constitutional mandate, and as creating a personal liability against stockholders. (p. 613.)

STATUTE, INTERPRETATION BY COURT, WHEN INTENDED.—A judgment of the supreme court of the state affirming a judgment against stockholders in corporations in actions against them based on their supposed personal liability under a statute must be regarded, though it does not so state in express terms, as interpreting that statute and affirming that liability exists under and because of it. (p. 613.)

CORPORATIONS.—THE LIABILITY OF STOCKHOLDERS ARISES UPON CONTRACT where, before they become such, there is a statute declaring what is the personal liability of stockholders in corporations. (p. 615.)

THE CONSTRUCTION OF THE CONSTITUTION AND STATUTES OF A STATE BY ITS SUPREME COURT is binding on the courts of other states. (p. 615.)

CORPORATIONS—ENFORCEMENT IN ONE STATE OF THE PERSONAL LIABILITY OF STOCKHOLDERS ARISING IN ANOTHER.—As the liability of stockholders imposed by the constitution and statutes of another state must be deemed contractual, it may be enforced in any other state, not as a matter of comity merely, but as a contract voluntarily entered into. (p. 615.)

Action to recover upon liability claimed to exist against defendants as stockholders of the State Bank of Kansas by virtue of the constitution and statutes of that state. A demurrer to the amended petition was sustained by the trial court, whose judgment was reversed by the circuit court. Defendant thereupon appealed.

Lee Elliott, for the plaintiff in error.

Frank Spellman and Virgil P. Kline, for the defendant in error.

334 SPEAR, J. Did the amended petition state a case? is the question before us, the ultimate question being, Can a creditor of an insolvent Kansas corporation maintain an action in Ohio, against a citizen of this state, to enforce statutory liability against him as a stockholder in a Kansas corporation?

Against such liability, and against the judgment of the circuit court, it is insisted that the provision of the Kansas constitution is not self-enforcing; that the legislation pleaded creates no liability; and that the supreme court of Kansas has not in fact passed upon the question as to whether or not the liability exists. Hence this court is at liberty to determine the matter by its own rules of interpretation, and this must lead to the result that no liability does exist.

The constitutional provision is given in the statement, but for perspicuity it is here repeated: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." It may be conceded that this constitutional provision, standing alone, is not sufficient; it is not self-executing. This conclusion is in consonance with the rules of construction generally adopted and is distinctly held by the supreme court of Kansas in *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331. It does not follow, however, that the provision is to be ig-

nored. It is not improper to consider it in connection with the statutes of that state upon the subject. It may be conceded, ³³⁵ further, that the language of the Kansas statutes respecting the liability of stockholders is not as direct as it might have been made, and much is claimed against the provision for liability by reason of the peculiar phraseology. But the question, in arriving at the proper construction is, What did the legislature mean by the language that is used? One provision, adopted in 1868, is that "no stockholder shall be liable to pay debts of a corporation beyond the amount due on his stock and an additional amount equal to the stock owned by him." The act further provides that "if any corporation, created under this or any other general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suit may be brought against any person or persons who are stockholders at the time of such dissolution, without joining the corporation in such suit." Another provision, enacted in 1883, is to the effect that "any corporation shall be deemed to be dissolved for the purpose of enabling creditors of such corporation to prosecute suits against the stockholders thereof and enforce their individual liability, if it be shown that such corporation has suspended business for more than one year."

Giving effect to the duty imposed upon the legislature by the imperative mandate of the constitution, "dues shall be secured," etc., how can it be supposed that the statutes enacted by the legislature upon the subject, and to which reference has been made, had any other purpose than to comply with this requirement, and can it be seriously doubted that that body intended by its legislation to make the provision which the constitution thus enjoins? We think not; and however inartificial the language of the section ³³⁶ of the statute first referred to, it seems to us clear that, being guided by the usual canons of construction, the reasonable conclusion is that, taking the entire legislation together, there is sufficient provision of law to establish the liability of the stockholder. But if there remain doubt about this, such doubt would be effectually removed by the holding of the supreme court of that state, pleaded in the petition, and found in the following decided cases, viz., *Howell v. Manglesdorf*, 33 Kan. 199, 5 Pac. 759; *Wells v. Robb*, 43 Kan. 201, 23 Pac. 148; *Abbey v. Dry Goods Co.*, 44 Kan. 415, 24 Pac. 426; *Ball v. Reese*, 53 Kan. 614, 62 Am. St. Rep. 638, 50 Pac. 875; *Woodworth*

v. Bowles, 61 Kan. 569, 60 Pac. 331. True, the holding of the court is not in direct, affirmative terms, but the judgments rendered are based upon the premise that the liability does exist, and would not have been rendered but for such condition.

Having thus ascertained that the liability of the defendant stockholder is fixed by the law of Kansas, we come to the question whether such liability may be enforced in the courts of Ohio. It is insisted by counsel for plaintiff in error that the obligation is purely statutory, if it exists at all; that it is in reality a penalty and a penalty only, and if so, would, as matter of course, not be enforceable outside the limits of the state of Kansas. This latter proposition may be conceded. But is the obligation purely statutory, and is the liability in the nature of a penalty? A penalty of a character which will not be enforced outside the jurisdiction implies some wrong done and that the money claimed is compensation, or by way of punishment. An instance of this character is found in *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14. The statute declares that a corporation shall not transact business until certain specified things have³³⁷ been done, and if it does so in violation of the statute, the trustees and corporators shall be liable in a specified amount, and this was held a penalty; but the distinction is clear between such an obligation and one where the liability is primary, or is based on contract. No fact appears in the present case to show that the stockholder has violated any statute or committed any wrong, and the wrong of the corporation is not the violation of any positive duty enjoined by law, but the failure to make a success of its business. Upon principle it seems clear that the demand is not for a penalty. And this conclusion is supported by abundant authority: *Aultman's Appeal*, 98 Pa. St. 505; *First Nat. Bank v. Gustin etc. Min. Co.*, 42 Minn. 327, 18 Am. St. Rep. 510, 44 N. W. 198; *Flash v. Conn*, 16 Fla. 428, 26 Am. Rep. 721; *Lowry v. Inman*, 46 N. Y. 119; *Cuykendall v. Miles*, 10 Fed. 342; *Bagley v. Tyler*, 43 Mo. App. 195; *Bank of North America v. Rindge*, 57 Fed. 279; *Crippen v. Loughton*, 69 N. H. 540, 76 Am. St. Rep. 192, 44 Atl. 538; *Kirtley v. Holmes*, 107 Fed. 1. What, then, is the nature of the stockholder's liability? Is it wholly statutory, resting entirely on the peculiar provisions of the Kansas statute, or is there another element which enters into the obligation? It may be conceded that it is not supported by

any rule of the common law, but this does not end the inquiry. The charter of this banking corporation—that is, the statute—provided that the stockholders should be liable individually to creditors upon the arising of certain contingencies. Knowing this, the stockholders became such with full knowledge, not only that they were thus stipulating for this liability, but with the knowledge that persons giving credit to the corporation would do so, and would rightfully give it, upon the faith of the personal liability of the stockholders.

³³⁸ It was an offer to become liable on the part of the stockholders, accepted by the creditor when the credit was given, and thus became a contract, made, it is true, not directly with the creditor, rather with the corporation perhaps, but one which was for the benefit of creditors, and to which, upon well-settled principles in this state (*Emmitt v. Brophy*, 42 Ohio St. 82), the creditors would have the right to resort in case the corporation itself should fail to respond: *Brown v. Hitchcock*, 36 Ohio St. 678; *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287. The provision of the statute does not create the liability; it is merely a legislative requirement that whoever becomes a stockholder shall at the same time assume an individual liability to the creditor; it is to declare the legal effect of the acts of the parties, which enable them to contract in a manner not authorized at common law. It was thus, as it seems to us, on principle, in the nature of a guaranty. But whether so or not the question has been settled by the decisions of the supreme court of Kansas. It is held by that court that the liability of a stockholder is a contractual liability, and arises from the contract of subscription to the capital stock, and that in so subscribing and becoming a stockholder, he thereby guarantees payment to the creditors of an amount equal to the par value of the stock owned by him. It is further held by that court that this liability is several; that it should be payable to the judgment creditor who first brings action, and that such action is transitory and may be brought wherever personal service can be made upon the stockholder. These facts are alleged in the petition, and the allegations are supported by the decisions heretofore cited: See, also, *Morawetz on Private Corporations*, sec. 870; *Cook on Stock and Stockholders*, ³³⁹ sec. 223. And the construction thus given to the constitution and statutes of Kansas would be binding upon this court, even though we did not agree with the interpretation there given on principle. It

being thus determined that the liability is contractual—that it, is several—and that the creditor first bringing action obtains a prior lien with which other creditors may not interfere, we see no reason why it cannot be enforced against the stockholder individually in Ohio, by action against him alone. True, our method of enforcing the liability of stockholders is by a proceeding in the nature of a suit in equity which contemplates the bringing in of the corporation, of all the creditors, and of all the stockholders, and a decree which will adjust and finally settle the rights and liabilities of the parties. This is made practicable because the corporation is a creature of our law, the stockholders principally residents of the state, and a multiplicity of suits may thus be avoided. But our courts have no jurisdiction to adjudicate the affairs of a foreign corporation, and any attempt to wind up its business by a comprehensive decree in our courts would be futile. Whether, where it is shown that there are other stockholders residing in Ohio, the plaintiff might properly make them parties, and maintain a suit against all that might be served, we need not inquire, for no such fact appears in the present case. However that may be, we think it cannot be said that the Kansas statutes are at variance with our legislation upon any matter of principle, or with the public policy of the state. The right to maintain the action here does not depend upon the exercise of comity; it rests wholly on the duty of the Ohio courts to enforce a contract voluntarily entered into in another state ³⁴⁰ and made legal by the laws of that state. And, as observed by Williams J., in *Heaton v. Eldridge*, 56 Ohio St. 97, 60 Am. St. Rep. 738, 46 N. E. 638: “The law of a state or country where a contract is executed and is to be performed enters into and becomes a part of the contract in the sense that its validity and obligatory effect are to be determined and controlled by that law; and when valid there, the contract will be sustained everywhere, and accorded the interpretation required by the law of the place where made, when the law is properly brought to the attention of the court, unless the contract is against good morals or contravenes a settled policy of the state or country in whose tribunals its enforcement is sought.”

We are aware that this ground of action is not favored by the courts of several of the states, notably those of New Hampshire, New York, and West Virginia, the holding being that the liability is wholly statutory and opposed to the policy of these states: *Grippen v. Leighton*, 69 N. H. 540, 76

Am. St. Rep. 172, 44 Atl. 538; *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 42 N. E. 419; *Nimick v. Mingo Iron Works Co.*, 25 W. Va. 184. On the other hand, the right to such remedy is maintained by the supreme court of Massachusetts and Illinois, in late decisions, although earlier decisions of the same courts denied them: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194, 52 N. E. 346. Also by the courts of Alabama (*Morris v. Glenn*, 87 Ala. 628, 7 South. 90); of California (*Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023); of Michigan (*Western Nat. Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105); and of Missouri (*Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132). Federal decisions are to like effect: *McVickar v. Jones*, 70 Fed. 754; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. Rep. 263. See, also, *Morawetz on Private Corporations*, sec. 875.

³⁴¹ We think the amended petition states a case, and the judgment of the circuit court overruling the demurrer will be affirmed.

Minshall, C. J., Williams, Burket, Davis and Shauck, JJ., concur.

The Decision in the Principal Case was followed by the same court in *Blair v. Newbegin*, 65 Ohio St. 425, 62 N. E. 1040. In this case the additional question was presented whether two or more stockholders whose liability was based upon a Kansas statute could be joined as defendants in a single proceeding in the state of Ohio. Upon this subject the court said:

"The contention against the judgment below is put in varying forms. As to Gage and Graham, it is insisted that whether the court acquired jurisdiction over them depends upon the character of the liability imposed by the Kansas statute. If that is joint, or joint and several, they could be joined; if several only, they could not be joined unless the statutes specially provide for joining them in that particular class of several liabilities. In fact, however, the Kansas statutes provide only for a several action, the liability being to respond only to an individual creditor for the whole amount of his claim up to the amount of the stockholder's holdings, there being no provision, as in Ohio, for joining all the stockholders and making an equitable assessment to pay the corporate debts. As matter of principle, the whole contention rests upon the proposition that the defendants were in no sense joint contractors; that their minds never met; that they never agreed to become jointly responsible for any debt of the corporation, but that whatever obligation each entered into was a several obligation, and, that being

so, no joint judgment could be rendered against them, and hence no joint action could be maintained.

"It is true that the supreme court of Kansas, in *Abbey v. Dry Goods Co.*, 44 Kan. 415, 24 Pac. 426, and in *Howell v. First Nat. Bank*, 52 Kan. 133, 34 Pac. 395, held that 'the liability of the stockholder is several and not joint, and when proceeded against by action, each must be sued separately.' The stockholders, it may be conceded, are not jointly liable in the sense that the liability is created by the same original instrument, to wit, the subscription to the stock, for it is not; nor in the sense that one may be held in an unlimited amount for the default of another. He cannot, in any event no matter how many others default, be held for more than the amount of his stock. But they are all, in a sense, guarantors for the same obligations and jointly liable in the sense that they are, to the extent above stated, equally liable to the creditors for their payment. And while their liability does not arise upon the same original promise, yet it does arise upon a promise of precisely the same character, and when one has paid, he may have contribution against those who have not paid. These are characteristics of joint liability, although, in the strictest sense, as already stated, the liability is not joint. Beyond this the stockholders became conditionally liable at the same moment and on the same evidence of indebtedness of the company, to wit, the note which is the foundation of the action, and alike conditionally liable on the judgment obtained thereon at its rendition, and alike absolutely liable at the same moment on the judgment on return of the execution against the corporation nulla bona, the corporation being insolvent and having been dissolved. These conditions as to liability attached to membership in the corporation, and when the corporation was exhausted the liability of the stockholders, all of them, was fixed and determined exactly alike in all respects save as to amount. All were, therefore, liable for the debt of the corporation thus ascertained, and, though perhaps not technically liable as joint obligors, yet beyond question severally liable, and it is difficult to see why they are not fairly brought within the spirit of our statute (section 5009), which provides: 'One or more of the persons severally liable on an instrument may be included in the same action thereon.'

"But, however this may be, giving due effect to the decisions cited as settling the question for the state courts of Kansas, do they settle it for the courts of Ohio? The Kansas statute already quoted provides that suits may be brought against any person or persons who were stockholders at the time of the dissolution, and then provides that where execution has been satisfied, the defendant or defendants may sue all who were stockholders for contribution; and it is further provided that a creditor may sue any stockholder severally. If this procedure were followed in this case, and recovery and collection had against Blair (the defendant in whose county the suit was commenced), he might sue the other two severally for their respective shares; or if Blair's liability did not

satisfy the plaintiff's claim, he (plaintiff) might sue either of the other defendants severally, and if there still remained something due on his judgment, he might sue the remaining defendant, thus leading to a multiplicity of suits. Indeed, it would seem, also, that plaintiff might, on this theory, maintain a separate suit against each stockholder at the same time. Such results would be at war with the spirit of our law. Not only is it required in a suit against a stockholder of an Ohio corporation that all other stockholders upon whom service may be had in the state be brought in, but by numerous provisions of statute is it made manifest that where no unjust results will follow, and where one judgment or decree may end a controversy, all persons who may be even remotely interested in the final result should be, or must be, made parties so that a speedy end may be had to the litigation. True, our statute requires, as to suits against stockholders of an Ohio corporation, that the corporation be brought in. The statute of Kansas, however, which gives effect to the stockholder's contract, dispenses with that formality, so that the right to have the corporation before the court does not attach to the stockholder's liability; such right does not pertain to his position as a stockholder; and it would seem that, in a case like the one at bar, the presence of the corporation would be a mere formality. A final judgment has been taken against it; it has been dissolved and its property appropriated; and it is apparent that its presence as a party could not avail either litigant in any aspect of the case. True, also, it is that the other creditors, if such there be, are not parties. But here, too, it is not perceived that their absence can work prejudice to any of the defendants inasmuch as the statute of Kansas, the law which gives character to the liability of the stockholders, and determines the substantive rights of all the parties, in terms permits one creditor to sue for himself, and protects the stockholder, where his statutory liability has been exhausted, from subsequent suits of other creditors. These matters all pertain to the legal rights of the parties, and for a determination of such rights, we look to the law of the jurisdiction where the liability accrued. Not so, however, necessarily with respect to the manner and means by which those rights are to be enforced. These are matters of procedure only. They relate, not to the substantive rights of the parties, nor to the rules of law upon which their respective claims are to be ultimately decided, but to the form of action and method of conducting it. So that, if the subject of the litigation can, consistent with the rights of the parties, be determined in one action, no reason is apparent, under the spirit of our laws, why such action cannot be maintained. In this manner the substantial rights of the parties are enforced, not as matter of comity, but because of a contract liability entered into in another state, and made enforceable by the laws of that state. But in thus giving effect to the law of a sister state as to matter of liability and the right to recover, we are not required to adopt the methods of the courts of that state

in working out results either upon the ground of comity or otherwise. But even the Kansas statute does not undertake to provide any form of action. It merely provides that suits may be brought against any persons who are stockholders, and in *New York Life Ins. Co. v. Beard*, 80 Fed. 66 (U. S. C. C., Dist. of Kan.), it is distinctly held that the provision above stated contemplates 'a proceeding either at law or in equity, as the facts may require, and that, while the liability is a severable one against each stockholder, yet to avoid a multiplicity of suits, a bill in equity may be maintained by judgment creditors against a number of the stockholders to enforce this double liability, and at the same time their liability for any unpaid stock.' Foster, J., in the opinion, observes: 'There is a severable liability imposed on each stockholder, and doubtless the creditor could proceed at law against any single stockholder; but it does not follow that this remedy is necessarily exclusive, and I do not understand that the supreme court of Kansas has so held in *Abbey v. Dry Goods Co.*, 44 Kan. 415, 24 Pac. 426, or in *Howell v. First Nat. Bank*, 52 Kan. 133, 34 Pac. 395. If a party has a plain and adequate remedy at law, equity will not interfere. Among the reasons, however, which justify a resort to equity, is that it prevents a multiplicity of suits at law.' Much learning on the subject is epitomized by Professor Pomeroy in his work on *Equity Jurisprudence*. We quote section 181: 'Where numerous actions at law are brought, or are about to be brought, either by the same or different parties, all involving and requiring the decision of the same questions of law or of fact, so that the determination of one would not likely affect the others, a court of equity may, in order to do full justice to the litigants and to avoid great expense, take cognizance and adjudicate upon all the rights and confer all the remedies in one suit, although both the primary rights and the final reliefs are legal. This instance of the concurrent jurisdiction plainly rests upon the arbitrary, unyielding and insufficient modes of procedure in actions at law, and in the ample power of the equitable procedure to adapt its judicial processes and its final reliefs to the circumstances of each case, by bringing in all these parties by means of one suit and decree.' Again, section 243: 'The multiplicity of suits to be avoided, which are generally actions at law, shows that the legal remedies are inadequate, and they cannot meet the needs of justice; and therefore a court of equity interferes, and although the primary rights and interests of the parties are legal in their nature, it takes cognizance of them, and awards some specific equitable remedy, which gives, perhaps, in one proceeding more substantial relief than could be obtained in numerous actions at law.' Section 245: 'Where the same party has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself

against all the adverse claimants as codefendants. It should be observed in this connection that the prevention of a multiplicity of suits as a ground for the equity jurisdiction does not mean the complete and absolute interdiction or prevention of any litigation concerning the matters in dispute, but the substitution of one equitable suit in place of the other kinds of judicial proceeding, by means of which the entire controversy may be finally decided.' Also section 269: 'The weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no common title nor community of rights or of interest in the subject matter, among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body.' Quoting further, and from section 274: 'The jurisdiction has been exercised in the following cases belonging to this class, and in most, if not all, of them it may be regarded as fully settled: In suits by a single plaintiff to establish a common right against a numerous body of persons, where the opposing claims of these individuals have some community of interest, or arise from some common title; . . . in suits by a single plaintiff against a numerous body of persons to establish his own right and defeat all the opposing claims, where the claims of these persons are legally separate, arose at different times and from different sources, and are common only with respect to their interest in the question involved and in the kind of relief to be obtained by or against each; in suits by a single plaintiff against numerous defendants, parties to a complicated contract, where his rights against each are similar and legal, but would require, for their determination, a number of simultaneous or successive actions at law.' Mr. Morawetz, in his work on Private Corporations, section 896, upon the same general subject, observes: 'However, the remedy by action at law does not exclude the remedy by bill in chancery. The scope of the two remedies is not the same. In an action at law, no final adjustment of the rights and equities existing among the stockholders and creditors is possible; in a proceeding in chancery, however, all rights and remedies can be fully adjusted and protected. The general rule, therefore, is that, although a creditor may sue the individual stockholder at law to enforce his statutory liability, the courts of equity maintain the jurisdiction for the purpose of enforcing ratable contribution among the stockholders and making just distribution of the proceeds among all the company's creditors.'

"It is further insisted that the right to be sued separately is a right which inheres in the contract on which the liability of the Kansas stockholder rests, by virtue of the construction of the stat-

utes by the Kansas courts; because when it is held that the stockholders must in that state be sued separately, the implication follows that they cannot be sued otherwise in any jurisdiction. But the answer to this is that the effect of the Kansas statutes is to make the obligation of the stockholder a contractual one, and an obligation resting upon contract may be enforced in any jurisdiction where service may be had on the party, and the method of enforcement, as we have already found, depends, not upon the law of the state where the contract is made, but upon that of the state where its enforcement is sought. There can be no vested right in the form of remedy. So that, when a stockholder subscribes to the capital stock of a corporation, he thereby assumes a contractual obligation, with the incident that the creditor may pursue him in any jurisdiction where service may be had upon him, and thus necessarily consents to the maintenance of such form of action as the law where the enforcement is sought may permit. We are aware that there are decisions of courts of high standing which are in apparent conflict with the conclusion we have reached, but, with due respect, we are not able to assent to the binding force of those decisions as applied to the jurisprudence of Ohio. Among many decisions bearing in greater or less degree upon the questions here discussed, we cite: *Umsted v. Buskirk*, 17 Ohio St. 113; *Northern Pac. R. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. Rep. 978; *Texas etc. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905; *Dennick v. Railroad Co.*, 103 U. S. 11; *Brown v. Trall*, 89 Fed. 641, 9 Am. & Eng. Corp. Cas. 162, and cases cited; *Weber v. Fickey*, 47 Md. 196; *Ball v. Reese*, 58 Kan. 614, 62 Am. St. Rep. 638, 50 Pac. 875; *Jacobson v. Allen*, 12 Fed. 454; *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023.

"It is further urged that the petition in this case is a mere creditor's bill in chancery, and that a creditor's bill cannot be maintained in this state on the judgment of another state. Not at all. The suit is not brought to reach debts due the corporation. The stockholder is not a debtor of the corporation; he is a debtor of the creditor. The form of the proceeding, it is true, is in the nature of an equitable action. The object is to bring stockholders who are within the jurisdiction of the Ohio court before it in one action, in order, as heretofore stated, to avoid a multiplicity of suits. This is the province of equity; we see no insuperable barrier to the accomplishment of that object in this suit. But the form of action is not of consequence here. Both by the statute of Kansas and by our own, the distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished, and there is substituted one form called a civil action. The sufficiency of a petition depends upon the allegations and not upon the form. If the action be properly brought, and the allegations of fact sufficient, the form is not of consequence."

The Personal Liability of Stockholders is considered contractual, and not penal: *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194, 52 N. E. 346; *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565, 79 N. W. 696. Hence it may be enforced in the courts of other states: *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194, 52 N. E. 346; *Aldrich v. Anchor Coal etc. Co.*, 24 Or. 32, 41 Am. St. Rep. 831, 32 Pac. 756; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; *Fowler v. Lamson*, 146 Ill. 472, 37 Am. St. Rep. 163, and monographic note, 34 N. E. 932. Compare *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 32 N. E. 419; and see, also, *Bates v. Day*, 198 Pa. St. 513, 82 Am. St. Rep. 811, 48 Atl. 407; *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711. If the courts of a state have construed its statutes imposing a liability upon stockholders, such construction must be followed by the courts of another state in actions therein to enforce such liability: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 Am. St. Rep. 414, 44 N. E. 349; *Ball v. Anderson*, 196 Pa. St. 86, 79 Am. St. Rep. 693, 46 Atl. 366.

CARR v. HULL.

[65 Ohio St. 394, 62 N. E. 439.]

ESTATES OF DECEDENTS.—THE LANDS OF A DECEDENT CANNOT BE SOLD to pay the costs of administration where he died without leaving any debts. (p. 627.)

Nathan Morse, for the plaintiff in error.

Grant & Sieber, for the defendants in error.

395 **MINSHALL, C. J.** The question in this case concerns the power of an administrator to cause the lands of a decedent to be sold to pay debts of the decedent, where the petition fails to aver, and no evidence is offered, that there are any such debts. Edwin Hull, a resident of Summit county, died in 1892 intestate. He left seven children, one of whom, a daughter, having intermarried, subsequently died, leaving a minor child, and Gideon Carr was appointed its guardian. He also left a farm worth about four thousand dollars, and some personalty. No administration was taken out upon his estate until July 15, 1897, when one Harrison, a stranger to the family, was appointed administrator by the probate court. On October 2d following, he filed a petition in the probate court of the county, asking for an order of sale of the lands to pay debts. There is no averment in the petition that the deceased left any debts of his own that had not been paid; and the answer of the guardian of the minor

that the deceased left no debts is not denied by a reply. It contained the averment, however, that "the charges of administration of the estate will amount to about four hundred dollars," and that the personal assets are thirty-nine dollars and some cents. A demurrer to the petition was overruled, and an answer filed by the guardian averring there were no debts of the decedent to be paid. A hearing was had and an order made for the sale of the land described in the petition. An appeal was taken to the common pleas. Pending the appeal in that court, Harrison died, and one Frederick, also a stranger, was appointed administrator de bonis ³⁹⁶ non, and the suit revived in his name. A hearing was had and a like order made for the sale of the land. The guardian took a bill of exceptions, which was made a part of the record. It contains all the evidence offered at the trial. There was no amendment of the petition in the common pleas, nor was it shown that the deceased left any debts of his own to be paid, nor was there any offer to so show. On error the judgment was affirmed by the circuit court.

It is claimed, in the first instance, that under section 6005 of the Revised Statutes, the probate court had no power to appoint a stranger as administrator, there being no creditors, without a showing that there are personal assets to the amount of one hundred dollars, which was not done on the appointment of Harrison, the amount as stated being but thirty-nine dollars and ninety cents. And it is further claimed that there was no authority under section 6018 of the Revised Statutes for the appointment of an administrator de bonis non, as in his application he stated that there were no assets, and did not aver that there were any debts to be paid. We may say that, from the record, it seems quite doubtful on the showing made whether the court had authority to appoint an administrator in the first instance, or to appoint a successor on his death. But be that as it may, we think their appointment cannot be questioned in a collateral proceeding. There should have been some direct proceeding for the purpose. Here it is collateral to the proceeding, being one to sell lands; and it is contrary to the policy of our law to permit a question of the kind to be raised in a collateral proceeding.

We come, then, to the power of the court, on the showing made, to order the sale of a decedent's lands, when it is not averred in the petition, nor shown, that ³⁹⁷ the decedent left

debts of his own unpaid; and the only reason assigned is that the sale may be made to pay costs of administration.

In this state, as in most of the states of the Union where the principles of the common law prevail, the personalty of a decedent who dies intestate passes to his administrator, who takes it in trust for the payment of the debts of the decedent and the distribution of the remainder among his next of kin; whilst his realty passes directly to his heirs as an estate of inheritance, subject, however, to a liability for the payment of his debts, if the personalty proves insufficient. But as the administrator has no title to the lands, the liability can only be enforced by a proper proceeding instituted by him for a sale of the lands, or so much thereof as may be necessary for the express purpose of paying debts of the decedent. The suit cannot be instituted for any other purpose: *Wood v. Butler*, 23 Ohio St. 520. The exercise of the power is regulated by statute, and, being special in its character, must be strictly pursued. Section 6136 of the Revised Statutes provides that: "As soon as an administrator shall ascertain that the personal estate in his hands will be insufficient to pay all the debts of the deceased, with the allowance to the widow and children for their support twelve months, and charges of administration of the estate, he shall apply to the probate court or the court of common pleas for authority to sell the real estate of the deceased."

It is further provided in section 6141 that: "The petition shall, in all cases, set forth the amount of debts due from the deceased, as nearly as they can be ascertained, and the amount of the charges of administration, the value of the personal ³⁹⁸ estate and effects, and a description of the real estate, and value thereof, if appraised."

It is argued that section 6136 confers power to sell for the payment of the charges of administration of the estate only. This we think is erroneous. The principal fact that must exist, in any case, to confer the power, is the existence of debts of the deceased, and that it is necessary to sell to pay those debts with the year's allowance to the widow and minor children, which is classed with the debts of the deceased, to which is added, as an incident, "charges of administration of the estate." This clause is not to be taken in a distributive sense, but collectively with one, or both, of the other grounds for making a sale. The proper construction is that sufficient of the lands may be sold to pay charges of administration,

where it is necessary to make a sale for the payment of the debts of the deceased, or the year's allowance. The debts or year's allowance is the principal fact on which the power may be invoked, to which charges of administration, as we have said, are incident. The charges of administration here referred to relate to the costs of the proceeding, attorneys' fees and administrator's commissions. This is the first time it seems that this precise question has been presented to this court; but the construction we have placed on the statute is not only required by its language and the policy of our laws, whereby the realty of a decedent who dies intestate descends to his heirs, subject only to a liability for the debts of the decedent, where the personalty is insufficient, but it is in harmony with the decisions elsewhere in states having laws for the settlement of estates of deceased persons similar to our own. Proceedings to sell lands by the administrator are construed strictly, and ³⁹⁹ made to depend upon the existence of unpaid debts of the deceased after exhausting the personalty; and power to sell to pay costs of administration only is denied. Mr. Woerner, an author who has devoted much learning and ability to the subject, says: "The petition, as appears from the preceding section, must aver the existence of debts remaining unpaid; and it is self-evident that the court must be satisfied in a lawful way of their existence, before there can be an order of sale of real estate; the court should hear proof and this should appear of record." And further: "The debts so proved to exist must be such as were contracted by the deceased himself. No sale will be ordered to pay expenses of administration alone, or any debts incurred by the executor or administrator, after the death of the testator or intestate, except funeral expenses." He then enumerates the states in which it has been so held, and adds: "No decision has come to the notice of the writer from any of the states in which the sale of real estate for the payment of the expenses of administration alone is held valid, except an intimation in a very briefly considered case in Indiana, which, however, was subsequently affirmed in a case fully argued, a dictum in New Jersey, and several cases in California, where there is a statutory provision to that effect, besides some other states in which the realty goes to the administrator like personalty": *American Law of Administration*, sec. 469.

The text of the author will be found supported by the following cases: *Walworth v. Abel*, 52 Pa. St. 370; *Farrar v.*

Dean, 24 Mo. 16; Fitch v. Whitbeck, 2 Barb. Ch. 161; In re Cornwall, Tuck. 250; Fitzgerald v. Glancy, 49 Ill. 465; Walker v. Diehl, 79 Ill. 473; Dean v. Dean, 2 Mass. 150; Drinkwater ⁴⁰⁰ v. Drinkwater, 4 Mass. 354; Mays v. Rogers, 52 Ark. 320, 12 S. W. 479; Moore v. Ware, 51 Miss. 206. See, also, Kinkead's Probate Law and Practice, sec. 393; Rorer on Judicial Sales, sec. 268. The case of Falley v. Gribbling, 128 Ind. 110, 26 N. E. 794, cited by counsel for defendant in error, is the case referred to by Mr. Woerner. It does not seem to be sustained by reason or authority and we see no reason for following it.

Counsel for the defendant in error also cite and rely with much confidence upon the case of Welsh v. Perkins, 8 Ohio, 52, as sustaining their contention. It does not, as we think, do so. In this case the administrator borrowed money to pay the taxes that had accrued on the lands of the decedent in his lifetime. These taxes were a charge upon the personalty, and it was the duty of the administrator to pay them. He borrowed money wherewith he paid the taxes, and a petition to sell the lands was sustained. By paying the taxes he was subrogated to the place of the state as a creditor, and so had a right to sell for his reimbursement. It was a sale in fact to pay debts of the decedent.

In Fitzgerald v. Glancy, 49 Ill. 465, which was a proceeding to pay debts, but where none of the deceased, and none whatever but costs of administration, were shown to exist, Chief Justice Breese severely criticised the proceeding as follows: "The objection to this proceeding is fundamental, and stands out in bold and startling relief, and, if allowed, would subject the real estate of intestates dying free from debt to the cupidity of unconscientious administrators, whose designs might be to appropriate it to themselves, to the injury of the heirs at law. The policy of our law most clearly is, that the real estate of decedents shall not be sold in this mode, except to pay ⁴⁰¹ debts due and owing at the death of the decedent." He then adds: "This is the first case, within our knowledge, where debts have been created by an administrator after the death of his intestate, and allowed by a court as claims against his estate, and an order granted to sell his lands to pay them. They were not such claims, and cannot, by any legal alchemy, be made such, and not being such, the order to sell this lot to pay them was erroneous and void. It has no legal basis to rest upon, and none whatever for the application in the first instance."

Judgment of the circuit court and of the court of common pleas reversed, and petition dismissed.

Williams, Burket, Spear, Davis and Shauck, JJ., concur.

The Sale of a Decedent's Property may be ordered, in California, when it is necessary to pay the debts, expenses, or charges of administration: *Estate of Freud*, 131 Cal. 667, 82 Am. St. Rep. 407, 63 Pac. 1080. See, further, *Neville v. Kenney*, 125 Ala. 149, 82 Am. St. Rep. 230, 28 South. 452; *Stuckey v. Watkins*, 112 Ga. 268, 81 Am. St. Rep. 47, 37 S. E. 401.

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY v. SCHAFFER.

[65 Ohio St. 414, 62 N. E. 1036.]

MASTER AND SERVANT.—An employer is not under any duty to give his discharged employé a clearance paper or statement showing whether the service or conduct of such employé was satisfactory, though without it he may be unable to obtain employment elsewhere. (p. 629.)

MASTER AND SERVANT—COMBINATIONS AGAINST PARTICULAR CLASSES OF EMPLOYÉS.—Railway corporations may lawfully combine or agree with one another to refuse to continue in their employ persons who have been engaged in a war upon their interests, commonly called a strike. (p. 630.)

SLANDER.—SILENCE CANNOT AMOUNT TO SLANDER. Hence an employer cannot be held liable for refusing to give a clearance card, though such refusal may, and probably will, prevent his obtaining employment. (p. 632.)

Plaintiff had been in the employ of the defendant railway company in December, 1894, at which time he was granted a leave of absence for about thirty days. On reporting for work about the 1st of February, 1895, he was notified that he had been discharged from further service. There had been, during the year 1894, on many of the roads what was commonly called the "A. R. U. strike." The plaintiff claimed that he had taken no part in such strike, but that in August, 1894, the defendant and other railways entered into a conspiracy that they would furnish one another information as to all employés who had committed, or were charged with the commission of, offenses or who had quit work during the strike, and were members of the American Railway Union, and that neither of them would employ any person without a release or consent of the company by whom he had been employed, and that such release was by railroad men called a clearance. On the application by plaintiff to the company

for such clearance, it was refused, as he claimed, willfully, maliciously, and in pursuance of such conspiracy. There was a verdict for the plaintiff and judgment thereon by the trial court, which was affirmed by the circuit court, and this proceeding was prosecuted to reverse such judgment of affirmation.

Williamson, Cushing & Clark and C. P. & L. Wickham, for the plaintiff in error.

Vickery & Vickery, for the defendant in error.

⁴¹⁸ DAVIS, J. It is important to note in this case, as was stated by the trial judge in his charge to the jury, that there was no obligation by custom or express agreement to give to the plaintiff a clearance. If, therefore, an obligation to furnish a clearance existed at all it must have arisen by implication of law; and ⁴¹⁹ the whole contention is whether the law imposed such an obligation upon the defendant, under the facts disclosed in this record.

The plaintiff alleges that he was unable to obtain employment after his discharge by the defendant, by reason of the failure and refusal of the defendant to furnish, on request, the plaintiff's record of service, or a consent and clearance. As there is no testimony in regard to "consent," that expression of the pleader may be disregarded. The term "clearance" is mentioned in the amended petition as a "card showing that the applicant was in no way connected with said strike"—that is, with the railroad strike in 1894, known as the "A. R. U. strike." The plaintiff, when on the witness-stand, stated that "a clearance is a paper showing the place of employment, kind of employment, the time and whether the service was satisfactory or not. . . . If it was satisfactory it would be a clearance; it would enable a man to go and show to a railroad company that it was all right, and if his work was unsatisfactory it would be otherwise—he had best not show it." The trial judge, charging the jury, said: "A statement of his record with his last employer, as the plaintiff claims, in brief, was a paper or clearance that it was agreed should be required. It is claimed that this was required so that a railroad company might know whether or not he was engaged in the A. R. U. strike." So that the gist of the complaint is that the plaintiff was prevented from obtaining employment by the malicious refusal of the defend-

ant to furnish the plaintiff with "a statement of his record with his last employer."

Upon the first offer of testimony by the plaintiff, the defendant objected to the introduction of any ⁴²⁰ testimony in the case on the ground that there was no case made in the pleadings such as would authorize any recovery. The court overruled the objection, reserving the decision of the question whether the plaintiff had pleaded a good cause of action, until the testimony was all in. In submitting the case to the jury, the court charged, in substance, that if the plaintiff agreed, combined, or conspired with other railroad companies that neither they nor any of them would employ any man who did not furnish a clearance—that is, a statement of his record from his former employer—and if the defendant, in accordance with such agreement, combination, or conspiracy, refused to furnish such statement of his record, with intent to prevent the plaintiff from obtaining employment from any or all of said railroad companies, then the plaintiff may recover. This instruction to the jury embodies the plaintiff's theory of his case, and if it is not sound law the plaintiff was not entitled to a judgment, whatever may have been the findings of the jury upon the issues of fact which were submitted to them.

Recurring to the second amended petition, upon which the case was tried, it appears that it is not alleged that the defendant agreed or conspired with other railroad companies to refuse to give to the plaintiff, or to any other discharged employé, a statement of his record, nor is there a scintilla of proof of such a combination; but, on the contrary, the distinct claim is that such refusal was the individual, malicious act of the defendant. It is the undoubted and unabridged natural right of every individual not to employ, or to refuse to employ, whomsoever he may wish, and he cannot be called upon to answer to the public or to individuals for his judgment. ⁴²¹ Nor can the motives which prompt his action be considered. In general terms, such right is as much inherent in corporate bodies as in natural persons. But whatever one person may lawfully do, two or more persons may join in doing. There can be no such thing as a conspiracy to do a lawful thing unless by unlawful means. If one railroad company may lawfully refuse to continue in its employ a person who has been engaged in a war upon its interests, called a strike, or who has shown himself to be negligent, incompetent, inefficient, or dishonest, there does not appear

to be any good reason why a number of railroad companies might not agree among themselves to not employ such a person. Indeed, there are obvious reasons, public and private, why they should do so. For example, it would be very inconsistent and unjust, if while holding railroad companies to strict accountability for the negligence of their servants, we should restrict them in the natural right to protect themselves in the matter of the selection of their employes. That such a combination or agreement may be lawfully made and executed is held in the following well-considered cases: *Macaulley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119; *Brewster v. Miller*, 101 Ky. 368, 41 S. W. 301; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111. And see *Cooley on Torts*, 2d ed., 329. If, therefore, the jury found the affirmative of the issue of fact submitted, whether the defendant combined with other companies in an agreement not to employ any person who did not furnish a statement of his record with his former employer, it would afford no basis for recovery, unless it should appear that this agreement, which is *prima facie* valid, was brought about by some illegal act of the defendant. If the defendant, by fraud, falsehood, or force, had ⁴²² brought about a refusal to employ the plaintiff, it would have committed a positive wrong against the plaintiff, which would have been actionable. Of this, however, there is not a scintilla of proof. But an agreement to tell the truth about the plaintiff, or a refusal to say anything about him would not make an otherwise legal concert of action an illegal one and authorize a recovery against the defendant. Says Field, C. J., in *Vegelahn v. Guntner*, 167 Mass. 103, 57 Am. St. Rep. 443, 44 N. E. 1079: "I am not convinced that to persuade one man not to enter into the employment of another, by telling the truth to him about such other person and his business, is actionable at common law, whatever the motive might be." The supreme court of Georgia, in passing upon the constitutionality of a statute which required certain classes of corporations to communicate to their discharged employes the reasons for discharge, under heavy penalty in the name of damages, said: "A statute which undertakes to make it the duty of incorporated railroad, express, and telegraph companies to engage in correspondence of this sort with their discharged agents and employes, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is vio-

lative of the general private right of silence enjoyed in this state by all persons, natural or artificial, from time immemorial, and is utterly void and of no effect. Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence, not less important nor less sacred. Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other": *Wallace v. Georgia etc. Co.*, 94 Ga. 732, 22 S. E. 579.

⁴²³ The theory of the circuit court that silence, or refusal to render a statement on request, is in the nature of a slander, and, if its effect is to prevent the person from obtaining employment, it is an actionable wrong, is untenable. As stated at the outset, there was between these parties no contract for a statement, and there is no statute in Ohio requiring it; indeed, it is doubtful whether one could be made that would be valid: *Wallace v. Georgia etc. Ry. Co.*, 94 Ga. 732, 22 S. E. 579. It is conclusively shown in *Cleveland etc. Ry. Co. v. Jenkins*, 174 Ill. 402, 405, 66 Am. St. Rep. 296, 51 N. E. 811, that no such duty is imposed on the employer by the common law. For convenience of reference, some of the authorities there cited are quoted here: "On examination it will be perceived that this right of an employer to give, as it is termed, a 'character' to his ex-employé is nothing more than a consequence of the right to communicate one's belief. . . . No one is under any obligation to make such a communication. He does not owe it as a duty, either to the employer or the employé, to make any communication on the subject": *Townshend on Slander and Libel*, 4th ed., 425. "It is not legally compulsory on a master or mistress to give a discharged servant any character, it matters not how much a servant is entitled to character in fairness or how cruel the refusal might be": 14 Am. & Eng. Ency. of Law, 1st ed., 799. "It is clear, however, that in the absence of any specific agreement to that effect there is no legal obligation binding a person who has retained another as a servant to give that person any character at all on dismissal, and that no action will lie against him for refusing to do so": *Smith on Master and Servant*, text-book ed., 380, 381. "The master is under no legal obligation to give a testimonial ⁴²⁴ of character to his servant": 2 *Parsons on Contracts*, *43, *44.

Without pursuing this discussion further, it may be said that the views of the courts below respecting the law govern-

ing this case, and as given in the charge to the jury, were entirely wrong, and that upon the facts which the jury were authorized to find upon the issues submitted to them, and which they are presumed to have found, the judgment ought to have been for the defendant.

Reversed and judgment for defendant.

Burket, Spear, and Shauck, JJ., concur.

MINSHALL, C. J. I concur in the judgment, and the syllabus as framed, but do not concur in the view expressed in the opinion that companies may enter into an agreement among themselves not to employ persons who have engaged in what is known as a "strike." Such an agreement is against public policy, as tending to encourage idleness and cause poverty among workingmen, by depriving them of the means of earning a livelihood for themselves and their families. Each company should be at liberty to employ such persons as in its judgment may seem best, unrestrained by any agreement with other companies. A particular company may be disposed to employ persons, although they may have been engaged in a strike, and would do so but for the fact that it is restrained by its agreement with other companies from doing so. It seems to me that such an agreement is clearly against public policy, and should not be recognized by the courts. To do so would, in effect, make engaging in a strike an offense punishable by exclusion from employment. The reason I concur in the ⁴²⁵ judgment and syllabus is, I fail to discern from the record that there was any evidence tending to show that the defendant had entered into an agreement with other companies not to employ persons who had been engaged in the railroad strike of 1894. All it did was to refuse to give the plaintiff a "clearance" when requested. This it might reasonably do for reasons stated in the opinion.

Record of Employé.—A railroad company has a right to keep a record of the causes for which it discharges an employé, but a false entry thereon must be regarded as intended to injure him, and therefore a malicious act: *Hundley v. Louisville etc. R. R. Co.*, 105 Ky. 162, 88 Am. St. Rep. 000, 48 S. W. 429. As to whether the publication of such record is libelous and actionable, see *Hebner v. Great Northern Ry. Co.*, 78 Minn. 289, 79 Am. St. Rep. 387, 80 N. W. 1128; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. 555.

Letter of Recommendation.—A railway company is under no obligation to give employés discharged, on leaving its employment, a clearance card, or letter of recommendation, though it is necessary to enable them to obtain employment elsewhere: *Cleveland etc. Ry. Co. v. Jenkins*, 174 Ill. 398, 66 Am. St. Rep. 296, 51 N. E. 811.

CASES
IN THE
SUPREME COURT
OF
OREGON.

JONES v. CONN.

[39 Or. 30, 64 Pac. 855, 65 Pac. 1068.]

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—

A riparian proprietor has a right to the use of the water naturally flowing past or through his land, subject to the right of lower riparian owners to a reasonable use thereof for domestic, agricultural, and manufacturing purposes. (p. 636.)

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—

Every riparian owner has a right to the ordinary use of water naturally flowing past his land for domestic purposes without regard to the effect of such use upon the lower proprietors. He also has the right to use it for any purpose whatever, provided he does not thereby interfere with the rights of other proprietors, either above or below him. (p. 636.)

WATERS AND WATERCOURSES—USE FOR IRRIGATION.—After the natural wants of all riparian proprietors are supplied, each proprietor is entitled to a reasonable use of the water for irrigating purposes. (p. 637.)

WATERS AND WATERCOURSES—RIPARIAN LANDS—WHAT ARE.—Lands bordering on a stream are riparian, if under one ownership, without regard to their extent or area, or the source or time of the acquirement of their title. (p. 639.)

WATERS AND WATERCOURSES—RIPARIAN OWNERS—WHO ARE.—Any person owning land which abuts upon, or through which a natural stream of water flows, is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. (p. 639.)

WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—Under a claim of riparian rights alone, the owner of land cannot, to the injury of another riparian owner, take the water beyond the watershed, or onto lands held by a title different from the title of those through which the stream flows. (p. 641.)

WATERS AND WATERCOURSES.—A right to make a reasonable use of the water of the stream depends on the ownership of the land abutting on or through which the stream flows, and

whether a given use is reasonable or not is a question of fact, to be determined under the circumstances of each particular case. The right to use the water belongs to the owner of the land, and the extent of its exercise is not to be determined by the area or contour of his land, but by its effect upon other riparian proprietors. (p. 641.)

WATERS AND WATERCOURSES.—The rule that the riparian proprietor is entitled to have the entire flow of the stream come down to his premises is subject to the limitation that an upper riparian proprietor may make such a use thereof as does not work any actual, material, and substantial damage to the common right of each proprietor. Whether the proposed use is reasonable does not depend so much upon the area of the land of the offending owner, or the place of the use, as upon the effect it has upon the correlative rights of the other proprietors. (p. 643.)

WATERS AND WATERCOURSES—RIGHT OF IRRIGATION.—A riparian owner who uses the water of the stream for the purpose of irrigation is not a wrongdoer, although his land lies above the level of the stream, so that it cannot be irrigated by means of ditches wholly upon his own land, if by such use he does not materially injure or interfere in any substantial way with the rights of other riparian proprietors. (p. 644.)

WATERS AND WATERCOURSES—IRRIGATION—INJUNCTION.—A court of equity cannot restrain the use of water by a riparian proprietor to irrigate his lands, unless it is shown that such use will injure other riparian proprietors; but if such owner sets up an absolute right to sufficient water to irrigate his land, regardless of the effect it may have upon other proprietors, such a decree may be rendered as will prevent such attempted use from ripening into an adverse title. (p. 644.)

WATERS AND WATERCOURSES—RIPARIAN RIGHTS—WATERSHED.—The right of the riparian owner to the use of the water of the stream for irrigation purposes is not limited to the watershed from which the water is taken, nor to bordering lands first segregated by the government. (p. 645.)

COSTS IN EQUITY CASES, and the manner in which they are awarded are in the discretion of the trial court, and the decision there made cannot be reviewed on appeal, unless clearly wrong. (p. 645.)

E. D. Sperry, A. S. Hammond, and E. M. Brattain, for the appellants.

C. A. Cogswell, W. W. Wiltshire, L. F. Conn, and R. Malloy, for the respondent.

³³ BEAN, C. J. 1. This is a controversy between riparian proprietors upon a natural watercourse. There is virtually but one question involved in the case, and that is whether the lands which the defendant seeks to irrigate are riparian in character. It is practically conceded that up to the commencement of the suit the plaintiffs had not been substantially injured or damaged on account of the use of the water by the defendant, and, as a consequence, are not entitled to an injunction if the lands are riparian; but the contention is

that they are nonriparian, ³⁴ and therefore the plaintiffs are entitled to an injunction restraining the use of the water thereon without proof of damage. It is common learning that every person through whose premises a stream of water flows has a right to its use and enjoyment as it passes through his land; but, as all other proprietors have a similar right, it necessarily follows that one cannot use or divert the water to the injury of another. The right of each must be exercised in subordination to that of all the others. Within these limits, each proprietor is entitled to such use of the stream as may be conformable to the usages and wants of the community. It is often said that a riparian proprietor has a right, inseparably annexed to the soil, to have the water of a stream flow down to his land as it is wont to run, undiminished in quantity and unimpaired in quality; and that, if an upper proprietor takes it from the stream, he must return substantially the same quantity again before it leaves his premises. This rule, however, is subject to the limitation, now well established, that each proprietor is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes, and such use is not to be denied him on account of the loss necessarily consequent upon its proper enjoyment. In short, he has a right, in the language of Vice-Chancellor Bacon, in *Earl of Sandwich v. Railway Co.*, 10 Ch. Div. 707, 712, "to make all the use he can—to derive every benefit he can—from the stream, provided he does not abstract so much as prevents other people from having equal enjoyment with himself"; or, as said by Lord Kingsdown in *Miner v. Gilmour*, 12 Moore P. C. C. 131, 156: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, ³⁵ and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use

of the water by other proprietors, and inflicts upon them a sensible injury."

The right of a riparian proprietor to the use of the water of a stream flowing through his premises, and its limitations, are well expressed in a Maryland case, where the court say: "The right of every riparian owner to the enjoyment of a stream of running water in its natural state in flow, quantity, and quality is too well established to require the citation of authorities. It is a right incident and appurtenant to the ownership of the land itself, and, being a common right, it follows that every proprietor is bound so to use the common right as not to interfere with an equally beneficial enjoyment of it by others. This is the necessary result of the equality of right among all the proprietors of that which is common to all. As such owner, he has the right to insist that the stream shall continue to run *uti cerre solebat*; that it shall continue to flow through his land in its usual quantity, at its natural place, and at its usual height. Without a grant, either express or implied, no proprietor has the right to obstruct, diminish, or accelerate the impelling force of a stream of running water. Of course, we are not to be understood as meaning there can be no diminution or increase of the flow whatever, for that would be ³⁶ to deny any valuable use of it. There may be, and there must be, allowed to all of that which is common a reasonable use; and such a use, although it may, to some extent, diminish the quantity, or affect, in a measure, the flow, of the stream, is perfectly consistent with the common right. The limits which separate the lawful from the unlawful use of a stream it may be difficult to define. It is, in fact, impossible to lay down a precise rule to cover all cases, and the question must be determined in each case, taking into consideration the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts. It is entirely a question of degree, the true test being whether the use is of such a character as to affect materially the equally beneficial use of the stream by others": *Mayor etc. of Baltimore v. Appold*, 42 Md. 442, 456.

It is accordingly now quite generally held in this country and in England that, after the natural wants of all the riparian proprietors have been supplied, each proprietor is entitled to a reasonable use of the water for irrigating purposes: Washburn on Easements, 2d ed., *240; Gould on Waters, 3d ed.,

sec. 217; Long on Irrigation, sec. 11; Black's Pomeroy on Water Rights, sec. 154; Kinney on Irrigation, sec. 273; 17 Am. & Eng. Ency. of Law, 2d ed., 487; Coffman v. Robbins, 8 Or. 278; Low v. Schaffer, 24 Or. 239, 33 Pac. 678; Weston v. Alden, 8 Mass. 135; Lux v. Haggin, 69 Cal. 255, 394, 10 Pac. 674; Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504; Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495; Baker v. Brown, 55 Tex. 377; Davis v. Getchell, 50 Me. 602, 79 Am. Dec. 636, 643, note. The doctrine as applied to the arid regions of the west is thus stated by Mr. Justice McFarland in Harris v. Harrison, 93 Cal. 676, 680, 29 Pac. 326: "According to the common-law doctrine of riparian ownership, as generally declared in ³⁷ England, and in most of the American states, upon the facts in the case at bar, the plaintiffs would be entitled to have the waters of Harrison Canyon continue to flow to and upon their land as they were naturally accustomed to flow, without any substantial deterioration in quality or diminution in quantity. But in some of the western and southwestern states and territories, where the year is divided into one wet and one dry season, and irrigation is necessary to successful cultivation of the soil, the doctrine of riparian ownership has by judicial decision been modified, or, rather, enlarged, so as to include the reasonable use of natural water for irrigating the riparian land, although such use may appreciably diminish the flow down to the lower riparian proprietor. . . . Of course, there will be great difficulty in many cases to determine what is such reasonable use; and 'what is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case.' . . . The larger the number of riparian proprietors whose rights are involved, the greater will be the difficulty of adjustment. In such a case the length of the stream, the volume of water in it, the extent of each ownership along the banks, the character of the soil owned by each contestant, the area sought to be irrigated by each—all these and many other considerations must enter into the solution of the problem; but one principle is surely established, namely, that no proprietor can absorb all the water of the stream so as to allow none to flow down to his neighbor." For the protection of the rights of the several riparian proprietors it has even been held that a court of equity may in a proper case apportion the flow of the stream, after the natural wants of the several proprietors have been satisfied, in such a man-

ner as may seem equitable and just under the circumstances: *Harris v. Harrison*, 93 Cal. 676, 680, 29 Pac. 326; *Wiggins* ³⁸ v. *Muscupiabe Water Co.*, 113 Cal. 182, 45 Pac. 160; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725.

2. The plaintiffs admit the rule that, after the natural wants of all the riparian proprietors have been supplied, each is entitled to a reasonable use of the water for irrigating purposes, but insist that the exercise of the right must be limited to the tract of land through which the stream flows as first segregated and sold by the government of the United States, and that, even in such a case, where there are natural barriers within the tract which would prevent a portion of the land from deriving any benefit from the flow of the stream, the portion lying beyond the barrier should be excluded. But, as we understand the law, lands bordering on a stream are riparian, without regard to their extent. After a considerable search, we are unable to find any rule determining when part of an entire tract owned by one person ceases to be riparian. The discussions in the books are restricted to a definition of riparian proprietors and their respective rights. A riparian proprietor is one whose land is bounded by a natural stream, or through whose land it flows, and riparian rights are those which he has to the use of the water of the stream. They are derived entirely from the ownership of the land, and not from its area or the source of its title. Mr. Angell remarks: "The owners of watercourses are denominated by the civilians 'riparian proprietors,' and the use of the same significant and convenient term is now fully introduced into the common law": Angell on Watercourses, 6th ed., sec. 10. Gould says: "Riparian rights proper depend upon the ownership of land contiguous to the water": Gould on Waters, 3d ed., sec. 148. And Kinney says that "the rights of riparian proprietors are such as grow out of, or are connected with, their ownership of the banks of the ³⁹ streams and rivers": Kinney on Irrigation, sec. 57. And, again (section 58): "Whether riparian rights attach or not, the principal question depends upon the ownership of the land which is contiguous to and touches upon the water. And as to whether the land is in actual contact with the flow of the stream, whether that contact be lateral or vertical, it is necessary that it should exist." Bouvier defines riparian proprietors as "those who own land bordering upon a watercourse." Mr. Long, in his recent work on Irrigation, in discussing this question, says:

"Some questions have been raised as to what lands are to be considered riparian, within the sense of the preceding section. Literally, of course, riparian lands are lands bordering upon a stream, but it is sometimes a question as to how far back from the stream the land may be considered riparian. There is very little judicial authority on the question. It is plainly not possible to define the distance to which the riparian proprietor's right to use the water for irrigation or other purposes extends, but this will depend upon the circumstances of each case. The only general rule that can be laid down is that the distance and use should be reasonable": Long on Irrigation, sec. 14.

It would seem, therefore, that any person owning land which abuts upon or through which a natural stream of water flows is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. The fact that he may have procured the particular tract washed by the stream at one time, and subsequently purchased land adjoining it, will not make him any the less a riparian proprietor, nor should it alone be a valid objection to his using the water on the land last acquired. The only thing necessary to entitle him to the right of a riparian proprietor is to show that the body of land owned by him ⁴⁰ borders upon a stream. This being established, the law gives to him certain rights in the water, the extent of which is limited and controlled less by the area of his land than by the volume of water and the effect of its use upon the rights of other riparian proprietors. By virtue of the ownership of land in proximity to the stream, he is entitled to a reasonable use of the water, which is defined as "any use that does not work actual, material, and substantial damage to the common right which each proprietor has, as limited and qualified by the precisely equal right of every other proprietor": Kinney on Irrigation, sec. 276. In the determination of what will be considered such a use in a particular case, the character and extent of the land, its location, and the time of acquiring the title may all become, and are, no doubt, important factors to be considered; but they are not controlling, and each case must depend entirely upon its own facts and circumstances. The case of *Boehmer v. Big Rock Irr. Dist.*, 117 Cal. 19, 48 Pac. 908, would seem to make the extent of riparian rights depend upon the source of title, rather than the fact of title; but in *Alta Land etc. Co. v.*

Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645, it was expressly held that all land bordering upon a stream which is held by the same title—in that instance consisting of twelve hundred and eighty acres—is riparian, and no distinction was made on account of the source of title. Again, in *Wiggins v. Muscupiabe Water Co.*, 113 Cal. 182, 54 Am. St. Rep. 337, 45 Pac. 160, and *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442, the right of a riparian proprietor to use the waters of a stream for irrigation was limited to the watershed. But, as we understand these cases, the court in each instance was determining the rights of the parties then before it, and not attempting to lay down an inflexible rule as a guide in all cases. Nothing ⁴¹ more was held or decided than that under the claim alone of riparian rights the owner of land cannot, to the injury of another riparian proprietor, take the water beyond the watershed, or onto lands held by a title different from the title of those through which the stream flows; and this all will concede. The right to make a reasonable use of the water of a stream is a right of property, depending on the ownership of the land abutting on or through which the stream flows; and whether a given use is reasonable or not is a question of fact, to be determined under the circumstances of each particular case. The right to use the water belongs to the owner of the land, and the extent of its exercise is not to be determined by the area or contour of his land, but by its effect upon other riparian proprietors.

A reference to a few of the adjudged cases will illustrate this principle. In *Norbury v. Kitchin*, 9 Jur., N. S., 132, the defendant, a riparian proprietor, erected pumps and conduit pipes to conduct the water of a stream across a hill into a reservoir, to await the use of a house built by him on property he had acquired subsequently to his riparian property. It was held that the question whether his use of the stream was reasonable under all the circumstances was properly left to the jury. In one of the opinions it is said: "The defendant has built himself a house on the side of a hill, and he formed a reservoir to supply his house with water from the stream. This exercise of his right seemed somewhat strong, and the plaintiff's counsel were at one time inclined to rely upon the distance of the house from the stream, but, probably, upon reflection, they found it immaterial. The real question in the case is whether a man who has three hundred and twenty-

one thousand gallons of water coming down to him can complain if ten thousand are taken before." *Elliot v. Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. ⁴² 85, was an action to recover damages for the diversion of water by a railroad company, an upper proprietor, for the use of its locomotives, engines, and other similar purposes. It was contended at the trial that, if the jury were satisfied of the existence of the stream and the diversion of the water by the defendant, plaintiff was entitled to a verdict for nominal damage, without proof of actual damage; but the presiding judge instructed the jury that, unless plaintiff suffered actual perceptible damage in consequence of the diversion, the defendant was not liable in the action, and this direction was held to be right by the entire court. In the course of the opinion, Mr. Chief Justice Shaw says: "The right to flowing water is now well settled to be a right incident to property in the land. It is a right *publici juris* of such character that whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending upon various circumstances. To take a quantity of water from a large running stream for agriculture or manufacturing purposes would cause no sensible or practical diminution of the benefit to the prejudice of a lower proprietor; whereas, taking the same quantity from a small running brook passing through many farms would be of great and manifest injury to those below, who need it for domestic supply, or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is, therefore, ⁴³ to a considerable extent, a question of degree. Still the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes."

In *Gardwood v. New York Cent. etc. R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 400, a riparian proprietor was allowed to maintain an action to recover damages against a railroad com-

pany for diverting the waters of a stream and conveying them by pipes to reservoirs, where its locomotives were supplied with water, the proof showing that the water so diverted was sufficient "to perceptibly reduce the volume of water" in the stream, and to "materially reduce or diminish the grinding power of plaintiff's mill," in consequence of which he sustained damage to a substantial amount. In *Gillis v. Chase*, 67 N. H. 161, 68 Am. St. Rep. 645, 31 Atl. 18, it is held that a riparian owner is not liable for a reasonable use of water passing his land, whether for his own purposes or for sale to others, and the reasonableness of his use is a question of fact. In this case it is said: "Each riparian proprietor having the right to a just and reasonable use of the water as it passes through and along his land, it is only when he transcends his right by an unreasonable and unauthorized use of it that an action will lie against him by another proprietor whose common and equal right to the flow and enjoyment of the water is thereby injuriously affected. And as the reasonableness of the use is, to a considerable extent, a question of degree, and largely dependent on the circumstances of each case, it is to be judged of by the jury, and must be determined at the trial term as a mixed question of law and fact." In *Fifield v. Spring Valley Waterworks*, 130 Cal. 552, 62 Pac. 1054, it was held by the supreme court of California that a lower riparian proprietor who is not injured by the diversion of water by a corporation conducting and carrying on the ⁴⁴ business of supplying the inhabitants of a city with water, cannot restrain such diversion. In *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, 6 South. 78, a riparian proprietor filed a bill to enjoin the diversion of water from the stream by an upper riparian proprietor, a water company, for the use of its waterworks, constructed to supply the inhabitants of a city with water. The testimony in the case established that the diversion of water for the purpose mentioned would result in a sensible diminution in the flow of the stream itself in the dry season or summer months, but that the complainant was making no particular use of the stream, and therefore suffered no special damage by the act of the defendant; and it was held that, as the defendant was taking the water for the purpose of supplying the wants of a neighboring town, and not returning it to its natural channel, the plaintiff was entitled to an injunction in vindication of his rights, without any special proof of damages; but, as he was not making any

particular use of the water, the injunction should be so framed as only to restrain its use "to the sensible injury or damage of the complainant for any purpose for which he may now or in the future have use for it."

3. It is apparent, therefore, that the rule so often stated and reiterated in the books, that a riparian proprietor is entitled to have the entire flow of the stream come down to his premises, is subject to the important limitation that an upper riparian proprietor may make such a use thereof as does not work any actual, material, and substantial damage to the common right which each proprietor has; and whether a proposed use is of the character referred to, and therefore reasonable, does not depend so much upon the area of the land of the offending proprietor, or the place of the use, as upon the effect ⁴⁵ it has upon the correlative rights of the other proprietors. Under this doctrine the defendant was not a wrongdoer when he used the waters of the stream for the purpose of irrigation, nor does the fact that his land lies above the level thereof, so that it cannot be irrigated by means of ditches wholly on his own premises, affect his right to the use of the water (*Charnock v. Higuerra*, 111 Cal. 473, 52 Am. St. Rep. 195, 44 Pac. 171), although it might have a material bearing upon the reasonableness of the use, if that question was here for decision: *Gould on Waters*, 3d ed., sec. 217. But there is no reason shown by this record why the defendant should be confined in the use of the water to any particular portion of his land. The amount of water taken and used by him before the trial was not sufficient to materially injure the plaintiffs, or to interfere in any substantial way with their rights as riparian proprietors. There seems to have been abundant water left in the stream after his diversion for the use of all the other riparian proprietors.

4. There is some conflict in the authorities as to whether a riparian proprietor can enjoin the use of water for the irrigation of nonriparian lands without showing damage (*Modoc Livestock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577; *Fifield v. Spring Valley Waterworks*, 30 Cal. 552, 62 Pac. 1054); but it is clear that a court of equity will not restrain the use of water by a riparian proprietor to irrigate his lands unless it is shown that such use will injure the other riparian proprietors: *Gould on Waters*, 3d ed., sec. 214. The plaintiffs, therefore, were not entitled to an injunction restraining the defendant from using

the waters of the stream for the purpose of irrigation, because such use was no injury to them. But as the defendant has set up in his answer, and attempted ⁴⁶ to maintain by his testimony, the absolute right to sufficient water to irrigate his land, regardless of the effect it may have upon the other proprietors, the plaintiffs are entitled to such a decree as will prevent his use from ripening into an adverse title: Gould on Waters, 3d ed., sec. 214; Kinney on Irrigation, sec. 329; Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 South. 78; Newhall v. Ireson, 8 Cush. 595, 54 Am. Dec. 790, and note.

5. It is suggested that the court ought to ascertain and determine the rights of the respective parties, and fix them in the decree, so that hereafter there may be no controversy concerning the matter. In the very nature of things, however, it is impossible in a case of this character to make such a decree. The rights of the several riparian proprietors are equal, each being entitled to but a reasonable use of the water for irrigating purposes, and what constitutes such use must necessarily depend upon the season, the volume of water in the stream, the area and character of the land which each riparian proprietor proposes to irrigate, and many other circumstances; so that it seems to us there is no basis upon which the court could frame any other decree than one enjoining and restraining the defendant from diverting the water from the stream to the substantial injury of the present or future rights of the plaintiffs, and, as the decree of the court below is to that effect, it will be affirmed.

ON MOTIONS FOR REHEARING.

BEAN, C. J. 6. Both parties have filed petitions for rehearing. The plaintiffs insist that the court erred in not holding ⁴⁷ that the right of a riparian proprietor to use the waters of a stream for irrigating purposes does not extend beyond the watershed, or to lands not first segregated and sold by the government. This question was examined with great care before the opinion was formulated. No authorities are cited or arguments advanced in the petition for rehearing not then fully examined and considered, and therefore the conclusion heretofore reached will be adhered to.

7. The defendant contends that the court erred in affirming that part of the decree which restrained him from using the water to the actual and perceptible injury of the plaintiffs, and in not decreeing that he recover costs and disbursements

in the court below. The argument is that since the court held that he is entitled to use the water to irrigate all his land if he does not thereby interfere with the correlative rights of the other riparian proprietors, and as the evidence did not show that he had actually so interfered up to the time of the trial, the complaint should have been dismissed. This position overlooks the fact noted in the original opinion that the defendant sets up in his answer an absolute right to divert two thousand six hundred and seventy-five inches of water from the stream, and had actually constructed a ditch for that purpose, tapping the stream one and one-half or two miles above his premises, through which he was threatening to take the water at the time the suit was commenced. It was to prevent any future contention that this claim or the use of the water thereunder had ripened into an adverse right as against the plaintiffs that the decree was so framed; and such a decree is manifestly within the power of a court of equity. The fact that defendant had not used the entire amount of water up to the time of the trial, and that plaintiffs ⁴⁸ did not prove actual damage, constitutes no objection to the maintenance of the suit or the form of the decree: *Cache La Poudre Reservoir Co. v. Water Supply etc. Co.*, 27 Colo. 532, 62 Pac. 420. It was this avowed determination of the defendant, no doubt, that influenced the trial court to decree that he pay the costs, and its conclusion will not be disturbed, as there does not seem to have been any abuse of discretion: *Dimmick v. Rosenfeld*, 34 Or. 101, 55 Pac. 100. The petitions for rehearing are therefore denied.

A Riparian Owner has a right to the reasonable use of a stream flowing by his premises. And, as all other owners on the stream have the same right, the right of none is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow, and purity, and to protection against material diversion or pollution: *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142; *Gehlen v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416, 70 N. W. 757. The rights of each riparian owner are subject to the limitation that others may have a reasonable use of the water for domestic, agricultural, and manufacturing purposes: *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495; *Tennessee Coal etc. Co. v. Hamilton*, 100 Ala. 252, 46 Am. St. Rep. 48, 14 South. 167. Whether a use is reasonable depends upon the circumstances of each case: *White v. East Lake Land Co.*, 96 Ga. 415, 51 Am. St. Rep. 141, 23 S. E. 393; and is a question for the jury: *Platt v. Waterbury*, 72 Conn. 531, 77 Am. St. Rep. 235, 45 Atl. 154; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303, 79 Am. St. Rep. 643, 58 N. E. 142.

Riparian Right Extends to all Lands bordering upon a stream, whatever its extent: *Alta Land etc. Co. v. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. 645. However, it is held that land situated beyond the watershed of a stream is not riparian, though it is part of a contiguous tract, some of which is riparian; and that the owner cannot, under the sole claim of riparian right, take the water beyond such watershed, to the injury of another riparian owner: *Bathgate v. Irvine*, 126 Cal. 135, 77 Am. St. Rep. 158, 58 Pac. 442.

Costs in Chancery Cases are ordinarily in the discretion of the court: *Carroll v. Tomlinson*, 192 Ill. 399, 85 Am. St. Rep. 344, 61 N. E. 484; *Guernsey v. Phinizy*, 113 Ga. 898, 84 Am. St. Rep. 270, 39 S. E. 402; *Pile v. Pedrick*, 167 Pa. St. 296, 46 Am. St. Rep. 677, 31 Atl. 646, 647.

STATE v. KNIGHTEN.

[39 Or. 63, 64 Pac. 866.]

RAPE—INDICTMENT—AGE OF ACCUSED.—It is not necessary to allege the age of the accused in an indictment for rape, under a statute providing that if any person over a stated age shall carnally know any female child under a stated age he shall be guilty of rape. If the accused was below the required age, it is mere matter of defense. (p. 647.)

RAPE—CORROBORATING EVIDENCE.—A conviction for rape may be sustained on the uncorroborated testimony of the prosecutrix. (p. 648.)

R. G. Smith and H. D. Norton, for the appellant.

D. R. N. Blackburn, attorney general, and A. E. Reames, district attorney, for the state.

⁶⁴ **BEAN, C. J.** 1. The defendant was convicted of the crime of rape by carnally knowing a female child under the age of sixteen years. Objection was made to the introduction of any testimony for the state on the ground that the indictment does not state a crime, because it does not allege that defendant was over the age of sixteen years when it was alleged to have been committed. The statute (Laws 1895, p. 67) provides that "if any person over the age of sixteen years shall carnally know any female child under the age of sixteen years," etc., he shall be deemed guilty of rape. It is argued that under this statute the age of the defendant is an essential ingredient of the crime, and must be averred in the indictment. But as we understand the statute, its only effect is to raise the age of capacity of the male from fourteen, as it was at common law, to sixteen years. At common law, a

boy under fourteen years of age was conclusively presumed to be physically incapable of committing the crime of rape, but it was never held that it was necessary to allege the age of the defendant in an indictment for that crime: 16 Am. & Eng. Ency. of Law, 1st ed., 315; Commonwealth v. Scannel, 11 Cush. 547; Sutton v. People, 145 Ill. 279, 34 N. E. 420; State v. Ward, 35 Minn. 182, 28 N. W. 192. Nor is it necessary under the statute. If the defendant was below the requisite age, it is a matter of defense. Mr. Bishop says the age of the defendant need not be set out, "though the statutory words are 'any person of the age of fourteen years and upward, who shall have carnal knowledge.' If he is below fourteen, it is simply matter for defense": Bishop on Statutory Crimes, 2d ed., sec. 482. The statute of California ⁶⁵ provided that "any person of the age of fourteen years and upward, who shall have carnal knowledge of any female child under the age of ten years, either with or without her consent, shall be adjudged guilty of the crime of rape"; and in People v. Ah Yek, 29 Cal. 575, it was held that an indictment silent as to the age of the defendant was good. Mr. Justice Sawyer, speaking for the court, said: "It does not appear upon the face of the indictment that defendant was under fourteen years of age, and we see no better reason for averring that he is over fourteen than in any other criminal case for averring that the party charged is of such an age as to render him capable in law of committing the crime. His capacity to commit the crime is as much an element in the crime in one case as in the other": See, also, People v. Wessel, 98 Cal. 352, 33 Pac. 216. The statute of Vermont also made it an offense punishable the same as rape for a person over the age of sixteen years to carnally know a female person under the age of fourteen years, with or without her consent; and in State v. Sullivan, 68 Vt. 540, 35 Atl. 479, it was held that it was not necessary to allege in the indictment the age of the defendant, but that, if he was under sixteen years of age, it was a mere matter of defense. We are of the opinion, therefore, that the indictment is sufficient.

2. It is also contended that there is no evidence corroborating the testimony of the prosecutrix; but in a case of this character the uncorroborated testimony of the prosecutrix is sufficient to sustain a conviction, because she is in no sense an accomplice: 2 Roscoe's Criminal Evidence, 8th ed., 1122; Boddie v. State, 52 Ala. 395; People v. Mayes, 66 Cal. 597,

56 Am. Rep. 126, 6 Pac. 691. It follows that the judgment of the court below must be affirmed, and it is so ordered.

An Indictment for Rape need not aver the age of either of the parties: See the monographic note to *Smith v. State*, 80 Am. Dec. 373. Neither need it specify the sex of the defendant, nor that the person ravished was not his wife: *State v. Williamson*, 22 Utah. 248, 83 Am. St. Rep. 780, 62 Pac. 1022.

A Conviction of Rape may be Sustained by the uncorroborated testimony of the prosecutrix: *Doyle v. State*, 39 Fla. 155, 63 Am. St. Rep. 159, 22 South. 272; *State v. Wilcox*, 111 Mo. 569, 33 Am. St. Rep. 551, 20 S. W. 314; *Bond v. State*, 63 Ark. 504, 58 Am. St. Rep. 129, 39 S. W. 554. There is authority, however, to the contrary: See the monographic note to *Smith v. State*, 80 Am. Dec. 369.

BROSNAN v. HARRIS.

[39 Or. 148, 65 Pac. 867.]

WATERS AND WATERCOURSES—RIGHT TO APPROPRIATE WATERS OF SPRINGS.—The waters of a perennial spring are subject to appropriation in the same manner as the waters of running streams. (p. 650.)

W. R. King and F. M. Saxton, for the appellant.

Smith & Heilner, for the respondent.

149 BEAN, C. J. This is a suit to restrain the diversion of and interference with the water of a certain spring in Malheur county, known as "Fox spring." Prior to August 4, 1899, the land upon which it is situated was unoccupied public land of the United States. In November, 1898, the plaintiff cut a ditch or trench some thirty feet long through the rim or embankment inclosing the spring, through which, in April, 1899, he conducted its waters into a "kind of a trail or swale that the snow water had made through there, and run it through this channel to" his premises, a quarter to half a mile distant, to be used, and which was used, for watering stock and other purposes, the surplus evaporating or disappearing in the ground without reaching any natural watercourse. In May, 1899, he filed what he intended to be a notice of location of all the waters of the spring, but which proved insufficient for want of a definite description, and soon thereafter contracted with some workmen to enlarge and develop the spring, and lay pipe therefrom to his premises, so as to preserve all

the water for use during the summer months, when it was his only natural supply. Before, however, any of this work was done, with the ¹⁵⁰ exception of opening out and enlarging the trench previously dug, the defendant took up the land on which the spring is situated as a homestead, and forbade plaintiff from taking or using the water therefrom. The defendant, in his answer and testimony, admits the existence of the spring, and says that at the time he entered upon the premises there was about an inch and a half of water flowing from it through an opening in the rim or embankment down to the plaintiff's premises. The court below decided in favor of the defendant, holding that the waters of the spring were not subject to appropriation, for the reason that there is no natural stream flowing therefrom, and it is not tributary to, nor does it form a part of, any natural watercourse. The argument is, in effect, that the waters of a perennial spring are not subject to appropriation unless they flow in a natural channel or form part of a watercourse.

There seem to be but few cases in which the rights of the appropriator of the waters of such a spring, as against a subsequent grantee of the government, have been considered. If the waters rise to the surface, so as to form a stream, it may, of course, be appropriated (*De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198), even by the construction of ditches up to the spring: *Ely v. Ferguson*, 91 Cal. 187, 27 Pac. 587. And in *Cross v. Kitts*, 69 Cal. 217, 10 Pac. 409, 58 Am. Rep. 558, the right to acquire title to percolating waters by appropriation is recognized, so far, at least, as to entitle the grantee of the water right to hold the same against a subsequent grantee of the mining claim on which the water was brought to the surface. But it was subsequently held that no right can be acquired by appropriation to the waters of a spring formed by percolation: *Southern Pac. R. R. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783. In the latter case, however, the question was as to the sufficiency of an ¹⁵¹ alleged appropriation of water on state land under the statute of California, and may, perhaps, on that ground, be distinguished from the case in hand. A decision directly in point is that of *Sullivan v. Northern Spy Min. Co.*, 11 Utah, 438, 40 Pac. 709, in which it is held that the discoverer of a flow of percolating water on public lands may, by digging wells and improving them, and constantly using the water for beneficial purposes, acquire a right to take it from such wells as against

one who, by subsequent location, acquires title to the land. The principle upon which this decision is grounded is that, where one goes upon public, unoccupied land of the United States, and diverts the water thereon from its natural source, and puts it to some beneficial use, he thereby acquires a right (which has been recognized by the legislation of Congress: U. S. Rev. Stats., secs. 2339, 2340) to continue such diversion and use as against a subsequent settler upon the land; and it is unimportant whether the diversion is from a natural watercourse, or a spring, or a well formed by percolation. Whatever doubt may exist elsewhere upon the question, it would seem that the right to make such an appropriation of waste, spring, or seepage water finds recognition in the legislation of this state. The act of 1893 (Laws 1893, p. 150), governing the right of priority to waste, spring, and seepage waters, provides that all ditches now constructed, or hereafter to be constructed, for the purpose of utilizing the waste, spring, or seepage waters of the state, shall be governed by the same laws relating to priority of right as ditches constructed for the purpose of utilizing the waters of running streams. Under this provision there would seem to be no distinction between the right to appropriate the waters of running streams and those of springs. The decree of the court below is therefore reversed, and one will be entered here in plaintiff's favor.

Springs of Water are of two classes: those which are fed by the seeping of water through the surrounding earth, and those which are formed by the breaking out upon the surface of a definite underground watercourse. The latter are governed by the same rules of law as are surface streams: *Metcalf v. Nelson*, 8 S. Dak. 87, 59 Am. St. Rep. 746, 65 N. W. 911. The owner of land upon which a spring is located that creates a stream accustomed to flow through the land of others has only the rights of a riparian owner, and cannot divert the water from its channel to supply a city: *Lord v. Meadowville Water Co.*, 135 Pa. St. 122, 20 Am. St. Rep. 864, 19 Atl. 1007. See, also, *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.

On **Percolating Waters** in general, see the monographic note to *Wheelock v. Jacobs*, 67 Am. St. Rep. 663-672; *Miller v. Black Rock etc. Imp. Co.*, 99 Va. 747, 86 Am. St. Rep. 924, 40 S. E. 27.

MOSIER v. OREGON NAVIGATION COMPANY.

[39 Or. 256, 64 Pac. 453.]

LATERAL SUPPORT—RAILROADS.—If a railroad company, while excavating on its own land or right of way, removes the lateral support of adjoining land, to the injury thereof, it is liable to the owner thereof, without proof of negligence. (p. 652.)

Cotton, Teal & Minor, for the appellant.

A. S. Bennett, for the respondent.

257 BEAN, C. J. This is an action to recover damages caused by a portion of the plaintiff's land sliding into an excavation made by the defendant company in the repair of its railroad. The verdict and judgment were for the plaintiff, and defendant appeals.

The facts, so far as material, may be briefly stated thus: In June, 1897, the defendant, desiring to straighten or change its track through the premises of the plaintiff, obtained a deed from her for a new right of way. Thereafter, in making the proposed change, a cut or excavation was made in the right of way so acquired, from twenty-five to forty feet in depth, through the foot of a hill or steep incline. It is alleged that, without taking any precaution to prevent the plaintiff's land from sliding into such excavation, the defendant negligently and carelessly fired heavy blasts in the vicinity, whereby one and one-half acres of her land were made to slide into and toward the excavation, another tract was undermined, access from one part of her premises to another was cut off, and a valuable spring of water destroyed. The defendant in its answer denies the negligence charged, alleges that its road was constructed in a careful and prudent manner, and pleads that plaintiff is estopped by her deed from claiming any damages on account of the injuries mentioned. The court below ruled that plaintiff could not recover without proof of negligence, but denied defendant's motion for a nonsuit on the ground that no such proof was offered or admitted. This ruling and the refusal to give certain instructions on the subject of negligence constitute the errors relied on for reversal of the judgment.

The questions thus raised are unimportant if the rule is, as contended by the plaintiff, that the defendant's ²⁵⁸ lia-

bility for removing the lateral supports of her land is absolute, and independent of any question of negligence. It is familiar law that an owner of land is entitled to have it remain in the state in which it was placed by nature, supported and protected by adjoining soil. This right of lateral support, as it is called, is a right of property annexed to the land, to which the owner is as much entitled as to the land itself. If an adjoining proprietor, in excavating on his own land, removes such support, to the injury of his neighbor's soil, he is liable in an action therefor, without proof of negligence: 1 Am. & Eng. Ency. of Law, 2d ed., 229; 3 Sutherland on Damages, 147; Jones on Easements, sec. 585; Tiedeman on Real Property, 2d ed., sec. 618; 10 Eng. Rul. Cas. 157; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312.

There is a conflict in the authorities as to whether this rule applies to railroad companies in constructing their roads over a right of way acquired by condemnation or grant, but we believe, with Mr. Elliott, that "the weight of authority, however, in accordance with what seems to us the better reason, is to the effect that the destruction of such lateral support by excavating on the company's own land so near that of the adjoining owner as to cause his land to slide into the excavation is a taking for which he is entitled to compensation, regardless of any question of negligence on the part of the railroad company": 3 Elliott on Railroads, 1406. Mr. Lewis, in discussing this question, says: "If, in the execution of public works under authority of law, excavations are made, and the soil of an individual gives way in consequence of being deprived of its lateral support, there is a taking to the extent of such deprivation, and the individual is entitled to compensation for the resulting damage. The right of lateral support is a part of his property in the land, as much so as his right of user or of exclusion. When he ²⁵⁹ is deprived of it, his property is taken just as much as if his property was invaded": 1 Lewis on Eminent Domain, 2d ed., sec. 151. The doctrine is very clearly stated in *McCullough v. St. Paul etc. Ry. Co.*, 52 Minn. 12, 17, 53 N. W. 802, 803. In that case the railroad company had acquired a right of way for its road over land belonging to one Oswald, by condemnation. Thereafter Oswald subdivided his property into lots and blocks, and the plaintiff became the owner of two lots adjoining the right of way. In constructing its line along the side of one of these lots, the company excavated the

earth to the depth of some twenty feet, without constructing an adequate lateral support to the adjacent soil, in consequence of which the earth from one of the lots fell into the excavation, and on the other sunk to a considerable extent, for which he brought an action against the company. The trial court held that plaintiff could not recover, but, on appeal, the judgment was reversed, the appellate court holding that the defendant, to justify its removal of the lateral support of plaintiff's soil, must show a right to do so, acquired either by condemnation or purchase, and that the right acquired by condemnation did not permit it to remove the soil adjoining its right of way, either by taking away the natural lateral support or otherwise. Mr. Chief Justice Gilfillan, speaking for the court, says: "To justify itself, the company must stand on this proposition, no other will suffice: That, having acquired the right to a strip one hundred feet wide on which to construct and maintain its railroad it may, wherever excavating may be, or at any time may become, necessary or expedient and prudent in constructing its road, measure the one hundred feet at the bottom of the excavation, instead of on the original surface of the ground, and may maintain the slopes on the adjoining land instead of on its own strip, unless the owner shall see fit to build a ²⁶⁰ retaining wall to keep his land in place. The proposition would apply as well to fills and embankments, where necessary, expedient, or prudent, and, if sound, would justify the company in claiming that it might measure the one hundred feet at the top of the embankment, leaving its slopes to rest on the soil of the adjoining owner, unless he should build a wall to prevent it. In either case, it would be constructing and maintaining the railroad, not on the strip taken for the purpose, but in part, at least, on the adjoining land, and that would be a taking requiring compensation to justify it."

In *Roushlang v. Chicago etc. Ry. Co.*, 115 Ind. 106, 17 N. E. 198, the company acquired by purchase a right of way across the plaintiff's land. In the construction of its road, it made an embankment on some marshy ground, causing an upheaval of the land adjoining the right of way, and rendering several acres worthless. It was held that the plaintiff might recover without charging negligence, the court saying: "The general rule is that, in the construction of its road upon an acquired right of way, a railway company is not liable beyond the compensation assessed or agreed upon, where such

compensation is fixed prior to the building of the road, unless it is guilty of negligence in such construction. That rule, however, must be limited to cases where the railway is constructed upon and within the limits of the right of way so acquired. Clearly, if a railway company should condemn or purchase a right of way of a certain width, and pay the damages assessed or agreed upon as resulting from the construction of its road upon that strip, it could not successfully claim the right to so construct its road as to cover land outside of the limits of such strip without the payment of additional compensation or additional damages resulting from such construction. If that were so, the company might condemn a strip of land ²⁶¹ twenty feet wide, and in the building and maintenance of high, and necessarily wide, embankments, cover and occupy a strip fifty or one hundred feet wide, without the payment of compensation or damages resulting from such occupancy. The real question in the case before us is not one of negligence, but of an encroachment upon land outside of the company's right of way." In *Richardson v. Vermont Cent. R. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283, the defendant in constructing its railroad made an excavation upon its own land, but so near the line of plaintiffs' adjoining land that the soil slid into the excavation, and defendant was held liable for the injury plaintiffs suffered thereby, regardless of the question of negligence. The following authorities are to the same effect: *Jones on Easements*, sec. 596; *Larson v. Metropolitan St. Ry. Co.*, 110 Mo. 234, 19 S. W. 416, 33 Am. St. Rep. 439, 467, note; *G. B. etc. Ry. Co. v. Eagles*, 9 Colo. 544, 13 Pac. 696; *Williams v. Natural Br. Road Co.*, 21 Mo. 580; *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 117; *Costigan v. Pennsylvania R. R. Co.*, 54 N. J. L. 223, 23 Atl. 810.

The cases of *Horstman v. Covington etc. R. R. Co.*, 18 B. Mon. 218, and *Boothby v. Androscoggin etc. R. R. Co.*, 51 Me. 318, are authority for the proposition that a railway company is not liable to an adjacent proprietor for an injury caused by the sliding of his soil into an excavation made by the company in the construction of its road, the court in the latter case saying that the "principle of the common law that a man must not dig so near the land of another as thereby to withdraw the natural support of the soil, . . . does not apply to excavations made in pursuance of a license, and a license from the legislature, if within its constitutional lim-

its, affords as ample protection as a license from the injured party." Both these cases seem to overlook the fact that the destruction of the lateral support, and consequent sliding ²⁶² of the adjacent soil, is as much a taking of the soil as if the company had actually occupied it, and it is therefore not within the "constitutional limits" of the legislature to license a railroad company or anyone else to remove such support without an equivalent, as required by the constitution. Nor are the damages for such an injury included either in a grant from the owner of a right of way or in a judgment of condemnation. The assessment of damages for the right of way, or a grant for such purpose, includes the value of the land itself, as well as all incidental injury, inconvenience, or damage incurred or liable to be incurred by the proper construction and use of the road, or by any acts necessary to such proper construction and use (Rorer on Railroads, 324), but not for a physical invasion of the soil outside of the right of way.

A leading case upon the question as to what constitutes a taking, within the meaning of the constitution, is that of *Eaton v. Boston etc. R. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147, an action for injury to plaintiff's land from the waters of an adjacent river, in times of freshet, flowing through a cut made by the railroad company, thereby flooding the land, and bringing down and lodging upon it quantities of earth and stone. It was conceded in the case that "if the cut through the ridge had been made by a private land owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action." The vital question, then, was whether the injuries complained of amounted to a taking of the plaintiff's property within the constitutional meaning of those terms, and the court held, in an elaborately considered opinion, which examines, classifies, and analyzes nearly, if not quite, all the cases on the subject then extant, that the plaintiff was entitled to recover, and that the injury to his land was a taking, within the meaning of the constitution, ²⁶³ not compensated for in the assessment for a right of way over his premises, nor justified by the legislative authority under which the defendant was acting: See, also, 1 Lewis on Eminent Domain, 2d ed., sec. 55 et seq.; Randall on Eminent Domain, secs. 150, 151. It follows from these views that the deed from plaintiff to defendant for the right of way over

her premises does not exempt the company from liability for an injury to her land caused by the removal of the lateral support thereto, and that she is entitled to recover such damages as she may have sustained thereby, regardless of the question of negligence. The judgment of the court below is therefore affirmed.

The Right of Lateral Support, and the remedies for its violation, are discussed in the monographic note to *Larson v. Metropolitan St. Ry. Co.*, 33 Am. St. Rep. 446-476. The right of lateral support is an absolute right of property, and the owner has a legal remedy against one who removes the natural support of the soil, which is based, not upon negligence, but upon the violation of the right of property: *Scultz v. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. 631. To excavate on one's land so as to deprive the land of his neighbor of lateral support is negligence, unless the excavator furnishes the support required: *Green v. Berge*, 105 Cal. 52, 45 Am. St. Rep. 25, 38 Pac. 539.

THIBAUT v. LENNON.

[39 Or. 280, 64 Pac. 449.]

APPELLATE PRACTICE—SUPPLYING RECORD.—Under a statute authorizing the appellate court to require the clerk of the court below to certify anything omitted from the transcript, or to dismiss the appeal on motion of respondent for such omission unless a cross-motion is made by appellant to supply the defect, a motion to dismiss an appeal because the transcript does not contain a notice of appeal should not be granted, where such omission is not the fault of the appellant, and he moves the court that the clerk of the court below be required to supply such notice. (p. 658.)

EXEMPTIONS—HOW CLAIMED.—To secure the benefit of a statute of exemptions, the debtor must, by timely interposition, select and reserve such property as he claims to be exempt when the officer seeks to take it in satisfaction of his writ. (p. 658.)

EXEMPTIONS—OUT OF WHAT PROPERTY MAY BE CLAIMED.—An execution debtor, no matter what other property he may have, has a right to select and claim particular property as exempt up to the limit fixed by the statute. (p. 658.)

J. S. Coke, Jr., and J. F. Hall, for the appellant.

D. L. Watson, Jr., and T. S. Minot, for the respondent.

281 WOLVERTON. J. 1. The statute requires that the transcript on appeal shall contain, among other things, a copy of the notice of appeal: *Hill's Annotated Laws*, sec. 541. Undoubtedly, the omission left the transcript incomplete. By

section 542, when it appears by affidavit to the satisfaction of the court that the transcript is incomplete in any particular substantially affecting the judgment or decree appealed ²⁸² from, the court shall, upon motion of the respondent, make a rule upon the clerk of the court below to certify up the omitted order, entry, or paper. But the respondent may, if he desires, file a motion to dismiss the appeal, which the court must allow, unless on the cross-motion of the appellant it make a rule directing the clerk to supply the omission. This affords ample authority by which to require the completion of an imperfect transcript. There was apparently a genuine effort to perfect the appeal in accordance with the statute, but by reason of the loss of the notice it could not be included in the record until it was supplied, and this without the fault of the appellant. There was a transcript filed, which was incomplete because it did not include the particular paper designated. Now, the appellate court is given power to require the proper officer to supply the omission and complete the transcript, so that the jurisdiction of the court was in no way affected by the absence of a copy of the notice from the record. It can hardly be said that the omission of this paper substantially affected the merits of the judgment appealed from; yet, as the law requires it to be in the record, the appellant was entitled to have it brought up, and when that was done it was all that the respondent could ask. The court having acquired jurisdiction, a dismissal was properly denied.

2. Household goods, furniture, and utensils of the value of three hundred dollars, if owned by a householder, and in actual use or kept for use by and for his family, are exempt from execution if selected and reserved by the judgment debtor at the time of the levy, or as soon thereafter and ²⁸³ before the sale as the same shall be known to him: Hill's Annotated Laws, sec. 282. Property of the nature indicated is not exempt except upon condition. The debtor must become an actor, and, in order to secure the benefit of the statute, must by timely interposition select and reserve such as he claims to be exempt when the officer seeks to take it in satisfaction of his writ. However, when he has done this, in the absence of fraud or any attempt to cover up other property of a like nature, or to secrete and so dispose of it as to elude the efforts of the officer, he has done all that is necessary for him to do in order to secure the benefits accorded.

The policy of the law is to extend the privilege of selecting such property as he may desire, not exceeding three hundred dollars in value. This he may do, although he possesses much more of the same kind, and the officer must look to such as he does not claim. It was said in *Smith v. Slade*, 57 Barb. 637, 640: "It is quite immaterial whether or not the plaintiff has not other articles besides those levied on, also exempted by statute, which, with those claimed in the action, exceed two hundred and fifty dollars. The statute limits the exemption by enumerating the articles which, within the value of two hundred and fifty dollars, are exempt; and if the articles so enumerated exceed that limit of two hundred and fifty dollars, the debtor may elect which description of property he will have exempted, if this election is made within a reasonable time." And again, in *State v. Finn*, 8 Mo. App. 261, 264: "The question whether plaintiff's relator had other property or not is immaterial. . . . If the sheriff says the debtor claiming exemption has other property not exempt, it is for him to find it and seize it. The execution debtor, no matter what other property he may have, has a right to select and claim particular property up to that limit fixed by the law." "By the weight of the authority," say the learned authors in 12 American and English Encyclopedia of Law, second edition, ²⁸⁴ 161, "both under statutes exempting specific articles and under statutes exempting property generally not exceeding a certain sum in value, the debtor's right to select and hold particular property as exempt is not in any way affected by the fact that he owns other property which is subject to execution, and which he has not surrendered to the officer." In further support of this view of the law, see *Bray v. Laird*, 44 Ala. 295; *Baldwin v. Talbot*, 43 Mich. 11, 4 N. W. 547; *Anderson v. Ege*, 44 Minn. 216, 46 N. W. 362; *Wilcox v. Hawley*, 31 N. Y. 648; *Elder v. Williams*, 16 Nev. 416; *Ross v. Hannah*, 18 Ala. 125; *Williamson v. Harris*, 57 Ala. 40, 29 Am. Rep. 707.

There are some states—notably Illinois—wherein it is held that the debtor is required, if he has more property than he is entitled to hold as exempt, to surrender or point it out to the officer before he is entitled to the release of that which he has selected and demanded; but our statute requires no such condition precedent at his hands. When, however, his right to the exemption is questioned, he must be able to show the necessary facts to entitle him to the privilege—namely,

that he is a householder; that the property claimed consists of household goods, furniture, and utensils, which are in actual use or kept for use by and for his family; that he is the owner; and that its value does not exceed three hundred dollars. When he has affirmatively proven these facts, he has established his claim (*Stewart v. McClung*, 12 Or. 431, 53 Am. Rep. 374, 8 Pac. 447), and he is not required to go further in order to prevail against the officer whom he has been compelled to sue in a court of justice to recover the possession of the property seized. It follows, therefore, that plaintiff was not required to show that she had not other property of the kind, or that she was not withholding any such, before she was entitled to that which was attached, and she ²⁸⁵ should have been permitted to go to the jury upon the case made. The trial court was therefore in error in granting the nonsuit, for which the judgment will be reversed and the cause remanded for a new trial.

Exemptions.—If a debtor has property of a certain kind in excess of the exemption, it is his duty to interpose his claim for exemption prior to the sale: *Harrington v. Smith*, 14 Colo. 376, 20 Am. St. Rep. 272, 23 Pac. 331. In some jurisdictions a claim of exemption may be filed at any time before the sale: *Boylston v. Rankin*, 114 Ala. 408, 62 Am. St. Rep. 111, 21 South. 995; *State v. Carson*, 27 Neb. 501, 20 Am. St. Rep. 681, 43 N. W. 361. But in Iowa the claim must be made at the time of the levy: *Note to Brown v. Leitch*, 31 Am. Rep. 44. It is no answer to a debtor's claim of exemption that he has other property: *Williamson v. Harris*, 57 Ala. 40, 29 Am. Rep. 707. That he may elect between what chattels he will hold exempt, see *Everett v. Herrin*, 46 Me. 357, 74 Am. Dec. 455; *Nolan v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435.

WESTERN SAVINGS COMPANY v. CURREY.

[39 Or. 407, 65 Pac. 360.]

JUDGMENTS—DOCKET OF—WHAT MUST SHOW.—The judgment docket must show the date "when docketed" and the particular court in which the judgment was rendered, in order for it to become a lien upon the real property of the judgment debtor. (p. 661.)

JUDGMENT DOCKET—CREATION OF LIEN.—Statutory provisions creating a lien by the docketing of a judgment are mandatory, and to be effectual must be substantially complied with. (pp. 662, 663.)

JUDGMENT DOCKET MUST AFFORD DEFINITE AND RELIABLE INFORMATION, as it respects the court in which

the judgment was rendered, the parties thereto, and the amount and time when rendered. (p. 662.)

JUDGMENT DOCKET.—EACH COURT MUST KEEP a separate judgment docket, which must show on its face that it is the judgment docket of a particular court. (p. 664.)

JUDGMENT DOCKET—IMPROPER RECORD.—A judgment docketed in a docket or record book, unknown to the law providing for the docketing of judgments, is ineffectual to create a lien. (p. 664.)

JUDGMENT DOCKET—PRESUMPTION OF PERFORMANCE OF OFFICIAL DUTY.—If a judgment docket does not show the date of docketing the judgment, as required by statute, there is no presumption that the clerk of the court properly docketed the judgment at the date of its rendition. (p. 664.)

C. Cole and O. B. Mount, for the appellant.

J. B. Messick, for the respondent.

⁴⁰⁹ **WOLVERTON, J.** The only questions involved are whether the judgment docket should show the date “when docketed” and the court in which the judgment was rendered, as necessary prerequisites to its becoming a lien upon the real property of the judgment debtor. A judgment or decree does not become a lien upon the debtor’s realty in this state merely by reason of its rendition and entry in the journal. It is the docketing that gives the lien and fixes the time when it attaches: Hill’s Annotated Laws, sec. 269; *Stannis v. Nicholson*, 2 Or. 332; *Creighton v. Leeds*, 9 Or. 215, 220. See note to 42 L. R. A. 209; *In re Boyd*, 4 Saw. 262, Fed. Cas. No. 1746. “The records of the circuit and county court are a register, journal, judgment docket, execution docket, fee-book, jury-book, and final record. . . . The judgment docket is a book wherein the judgments and decrees are docketed, as elsewhere provided in this code. Each page thereof shall be divided into eight columns, and headed as follows: Judgment debtors; judgment creditors; amount of judgment; date of entry in journal; when docketed; appeal, when taken; decision on appeal; satisfaction, when entered”: Hill’s Annotated Laws, secs. 569, 572. And by section 269 it is provided that, “immediately after the entry of judgment in any action, the clerk shall docket the same in the judgment docket. . . . From the date of docketing a judgment as in this title provided, . . . such judgment shall be a lien upon all the real property of the defendant within the county, . . . or which he may afterward acquire therein, during the time an execution may issue thereon.” A conveyance is rendered void as against the lien of a judgment unless recorded at the time

of the docketing, or within the time after its ⁴¹⁰ execution provided by law as between conveyances for the same real property: Hill's Annotated Laws, sec. 271. And it has been held that a judgment lien must be acquired in good faith, and without notice of a prior unrecorded deed, to be effectual as against it, thus assimilating the acquirement of the lien in so far as it is affected by notice and good faith to the acquirement of title by conveyance; which construction of the statute, although not literal, is said to be "entirely consistent with the reason and spirit": *Baker v. Woodward*, 12 Or. 3, 13, 6 Pac. 173; *Laurent v. Lanning*, 32 Or. 11, 51 Pac. 80. The fifth column of the docket in controversy bears the heading, "Entered in Judgment-book," whereas it should have been, "When Docketed," under the statute. There is under this heading the words, "No. Page," and beneath these the letter and figures, "K, 306." The date of entry is entirely omitted from the record. There is attached to the complaint what purports to be a true copy of the judgment docket. This bears the heading, "Judgment Lien Docket, Baker County, Oregon," which is all the evidence that we have indicating the court in which the judgment was rendered.

The purpose of the judgment docket is twofold: 1. To create a lien upon the debtor's real property, and thereby increase the efficiency and usefulness of the judgment; and 2. To impart and afford convenient notice and knowledge of such lien to those dealing with the property thus encumbered. The judgment docket, therefore, becomes an important and essential record. The statute has prescribed with significant detail by what courts it shall be kept, and the manner in which it shall be made up, and the lien which its instrumentality affords is purely statutory, as it did not exist at common law. As a general rule, enactments designed for the creation of a lien must be substantially complied with in order to effectuate their ⁴¹¹ purpose. Whatever is pointed out is in the nature of a condition to its creation or acquirement, and, unless there is an observance of the conditions in matters of substance, the structure must necessarily be incomplete, and consequently insufficient: *Nicolai v. Van Fridagh*, 23 Or. 149, 31 Pac. 288; *Gordon v. Deal*, 23 Or. 153, 31 Pac. 287; *Schneider v. Sears*, 13 Or. 69, 8 Pac. 841. But the detail and particularity attending the enactment creating the judgment lien afford ample evidence of a legislative intentment that the rule should have positive application in the

solution of the question whether the lien has become effective under its provisions. Now, the judgment docket was intended, no doubt, to afford definite and reliable information as it respects the court in which the judgment was rendered, the parties thereto, the amount and time when rendered; and to do this, it must needs contain a complete abstract of the judgment comprising these several heads. This was to relieve interested parties from the necessity of going back to the journal and other records and files of the court to ascertain the nature and effect of the judgment, and thereby to determine whether the lien thereof has become effective. It is a record quite apart and distinct from any that precedes it, wholly unnecessary to a valid judgment, but absolutely essential to the creation of a valid lien, in so far, at least, as it concerns strangers to the record. It should therefore be complete within itself, and reveal a perfect lien, without the necessity of calling to its aid other instrumentalities. There could be no intelligent abstract of the judgment without an observance in statement of these several particulars. The requirement of a statement, "When docketed," is manifestly unnecessary to a perfect abstract of the judgment rendered, but it is highly important by which to determine when the lien became effective. The statute prescribes that "from the date of docketing ⁴¹² such judgment shall become a lien," and the question recurs, Can any of these items of information or directions, including an entry of the date "when docketed," be dispensed with or omitted from the judgment docket without vitally detracting from its validity and efficiency in creating a lien upon the debtor's realty? To say that the statute is directory merely is to inaugurate a practice that would render that uncertain and equivocal which has been directed to be performed in detail and with particularity, and eventually defeat its purpose to impart definite and positive notice and information to the public and persons interested touching a matter of vital concern.

All these provisions are important. They prescribe a method unknown to the common law by which to enhance the creditor's remedy by encumbering the debtor's realty, and titles are made dependent upon them. They should, therefore, receive such interpretation as will give strength, certainty, and uniformity to the method and effectuate its purposes. "This can only be done," says Mr. Chief Justice Merimon in *Dewey v. Sugg*, 109 N. C. 328, 13 S. E. 923, "by

a strict observance of at least the substance of the requirements prescribed. Otherwise, uncertainty, confusion, and injustice must prevail to a greater or less extent in its administration." In further support of the view here adopted, see *Hutchinson v. Gorham*, 37 Or. 347, 61 Pac. 431; *Bonner v. Grigsby*, 84 Tex. 330, 31 Am. St. Rep. 48, 19 S. W. 511; *Davis v. Steeps*, 87 Wis. 472, 58 N. W. 769; *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297, 42 N. W. 325; *Sears v. Burnham*, 17 N. Y. 445. These considerations lead us to the following conclusions: There should be two judgment dockets kept, one for each (of) the circuit and county courts, and the judgment⁴¹³ should be entered in the docket of the court where rendered. This has not been done in the case at bar. The entry appears to have been made in a general docket, denominated "Judgment Lien Docket, Baker County, Oregon." No such docket or record is known to the law, and for this reason it is ineffectual to the creation of a lien. It is also ineffectual for the reason that it contains no notation of the date "when docketed." The notation is a prerequisite to a valid docketing, made so by statute, and no lien can attach without it. The heading, "Entered in Judgment-Book," instead of, "When Docketed," is perhaps an irregularity, and not of vital importance: *Weil v. Howard*, 4 Nev. 384.

It is sought to invoke the presumption that official duty was regularly performed in aid of the record as to the date of docketing; that, as the clerk was directed by law to make the entry immediately after the entry of judgment, it will be presumed that he did it; and hence that the lien attached from the time when the judgment was entered in the journal. The presumption has application where there is nothing to show what has been done, but here it is perfectly patent that the clerk has not done that which the law has required of him. The record shows that he has done something else in connection with the docketing, but has omitted to make the notation, and to invoke a presumption that he has done a thing which it is perfectly clear from his very act that he has not done, is to adopt an absurdity as a rule of action. The application which it is sought to make of the presumption would render that a nonessential which the law holds to be essential, and cannot be tolerated. The decree of the court below will be affirmed.

DOCKETING JUDGMENTS.

- I. General Principles.
- II. Creation of Lien.
 - a. Generally.
 - b. Irregularities in Docketing.
 - c. Errors or Omissions in Names as Affecting Lien.
- III. Indexing.
- IV. Justice's Dockets.

I. General Principles.

There can be no judgment capable of being docketed or enforced in any manner until it is entered in the judgment-book, and docketing without such entry is of no avail, although a judgment-roll containing a purported copy of a judgment has been made up and filed: *Rockwood v. Davenport*, 37 Minn. 533, 5 Am. St. Rep. 872, 35 N. W. 377. While judgments are for other purposes valid as soon as rendered, they do not generally become liens upon real estate, at least as against subsequent purchasers, without notice, until docketed, and as the object of docketing the judgment is to create a lien, such docket entry, in order to operate as constructive notice, must contain all the essential matters required by the statute: *Hesse v. Mann*, 40 Wis. 560; *Davis v. Steeps*, 87 Wis. 472, 41 Am. St. Rep. 51, 58 N. W. 769. As the docket entry is not part of the judicial proceeding, which ends with the entry of the judgment, such entry cannot be referred to for the purpose of supplying omissions or explaining ambiguities in the docket. The latter must be complete in itself: *In re Boyd*, 4 Saw. 262, Fed. Cas. No. 1746. Generally, however, the failure to docket a judgment, or a mistake or omission made in attempting to docket it, does not wholly destroy its effect as a lien, but merely makes the lien inoperative as against bona fide purchasers and encumbrancers having no actual or constructive notice of the judgment: *Cushing v. Edwards*, 68 Iowa, 145, 25 N. W. 940; *Fuller v. Nelson*, 35 Minn. 213, 28 N. W. 511; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305. It has been declared that the lien of a judgment on land is not lost by the failure of the clerk of the court to enter the judgment on the judgment docket, although such real estate has passed into the hands of a bona fide purchaser without notice of such judgment: *Johnson v. Schloesser*, 146 Ind. 509, 58 Am. St. Rep. 367, 45 N. E. 702. The lien of an attachment on land is not merged in the judgment until the latter becomes a lien, and if the judgment has not been docketed, the lien of the attachment still remains upon the land: *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254. If a judgment, when rendered, is entered on the minutes of the court, its effect is not vitiated by the fact that it is not then entered on the judgment docket: *Risk v. Uffelmann*, 7 Misc. Rep. 133, 27 N. Y. Supp. 392; *Girard Life Ins. Co. v. Farmers' etc. Bank*, 57 Pa. St. 388. The docketing of a judgment

is a ministerial act and may be effectively performed on a non-judicial day: *In re Worthington*, 7 Biss. 455, Fed. Cas. No. 18,051; and while the duty of docketing judgments is imposed upon the clerk of the court or some other officer, the protection of the plaintiff's interests requires that he see that this duty is properly performed. If these are bona fide purchasers or encumbrancers before the proper docket entries are made, their rights are paramount to the plaintiff's lien: *Bell v. Davis*, 75 Ind. 314; *Johnson v. Exchange Bank*, 33 Gratt. 473; because they are not bound to examine for judgment liens further than to look into the proper dockets. Hence, if the clerk or other officer fails to make the proper entries in his dockets, the only remedy of the wronged judgment creditor is by action against the officer: *Ridgway's Appeal*, 15 Pa. St. 177, 53 Am. Dec. 586; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Holman v. Miller*, 103 N. C. 118, 9 S. E. 429. If a judgment is docketed for too small a sum by mistake, the docketing may, on motion, be corrected, but not so as to affect the rights of purchasers or encumbrancers acquired prior to the correction: *Hunt v. Grant*, 19 Wend. 90.

The statute of limitations begins to run against a judgment appealed from, from the time that a minute of the judgment of the supreme court is entered on the docket of the lower court: *McMann v. Superior Court*, 74 Cal. 106, 15 Pac. 448; and if the statute of limitations has run against a judgment at the time when it is docketed, its entry on the docket cannot give it any validity: *Slocum v. Stoddard*, 7 Civ. Proc. Rep. 240; *Woodard v. Paxton*, 101 N. C. 26, 7 S. E. 469.

II. Creation of Lien.

a. Generally, though perhaps not universally, the statutes of the different states governing the liens of judgments entered therein either require them to be docketed or that a transcript thereof be filed in some public office in order to notify intending purchasers and encumbrancers from or under the defendant of the rendition of the judgment against him, and of the amount thereof. If the statute is substantially complied with, all persons must take notice of the judgment, and any interest thereafter acquired by them from the defendant, whether by his voluntary act or by compulsion of law, is subordinate to the judgment lien, and liable to be extinguished by proceedings taken for its satisfaction: *Andrews v. Doe*, 6 How. (Miss.) 554, 38 Am. Dec. 450; *Leake v. Ferguson*, 2 Gratt. 420; *Redd v. Ramey*, 31 Gratt. 265; *Gordon v. Rixey*, 76 Va. 694.

Undoubtedly, the rule as established by the great weight of authority is that judgments do not become liens upon real estate of the judgment debtor, at least as against subsequent purchasers or encumbrancers without notice until they have been entered upon the judgment docket: *Barroilhet v. Hathaway*, 31 Cal. 395, 89 Am. Dec. 193; *Burney v. Boyett*, 1 How. (Miss.) 39; *Planters' Bank v. Conger*, 12 Smedes & M. 527; *Sklower v. Abbott*, 19

Mont. 228, 47 Pac. 901; *Reeves v. Johnson*, 12 N. J. L. 29; *Close v. Close*, 28 N. J. Eq. 472; *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305; *Hardy v. Carr*, 104 N. C. 33, 10 S. E. 128; *Stannis v. Nicholson*, 2 Or. 332; *Welch v. Murray*, 4 Dall. 320, 4 Yeates, 197; *Foster v. Chapman*, 4 McCord, 291; *De Saussure v. Zeigler*, 6 S. C. 12; *In re Boyd*, 4 Saw. 262, Fed. Cas. No. 1746. In Virginia and West Virginia, however, the judgment is a lien from the time of its rendition, and not from the time of docketing. Consequently, an undocketed judgment is a good lien, as against subsequent creditors with or without notice, and as against every other person except a purchaser of real estate of the judgment debtor without notice: *Gordon v. Rixey*, 76 Va. 694; *Gurnee v. Johnson*, 77 Va. 712; *Anderson v. Nagle*, 12 W. Va. 98; and if two judgments remain undocketed for a number of years, after which the one last recovered is first docketed, the one first recovered nevertheless retains precedence, as a lien upon the lands of the judgment debtor remaining unalienated when it was docketed: *Anderson v. Nagle*, 12 W. Va. 98. In a majority of the states, however, judgments as against one another rank as liens from the date of their respective docketing, and hence a sale under the one first docketed vests title in the purchaser, free of prior judgments more recently docketed: *Mann's Appeal*, 1 Pa. St. 24.

The entry of the judgment on the judgment docket is not necessary to create a lien on the real estate of the judgment debtor, as between the parties to the suit or as against third persons with actual notice of the rendition of the judgment: *Wheeler v. Heermans*, 3 Sand. Ch. 597; *York Bank's Appeal*, 36 Pa. St. 458; *Craig v. Sebrell*, 9 Gratt. 131. An undocketed judgment is not a lien as against subsequent bona fide purchasers or encumbrancers for a valuable consideration: *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663; *Blydenburgh v. Northrop*, 13 How. Pr. 289; *Whitehead v. Latham*, 83 N. C. 232; *Gurnee v. Johnson*, 77 Va. 712; *Duncan v. Custard*, 24 W. Va. 730.

Notice of an undocketed judgment by confession is not notice of the lien of such judgment, because in such case there is no actual suit, or recovery, until the judgment is entered by the clerk on the docket: *Blydenburgh v. Northrop*, 13 How. Pr. 289.

The docketing of a judgment is not notice thereof to a person in occupation of the land of the judgment debtor under a contract of purchase, and payments subsequently made by him to such debtor pursuant to his contract, without actual notice of the judgment, are valid as against the lien upon the land: *Moyer v. Hinman*, 13 N. Y. 180.

If, on appeal, the judgment of the lower court is affirmed with costs or damages, the latter do not constitute a lien until docketed in the lower court. Were it otherwise, purchasers could never ascertain what burdens were imposed upon land by judgments until the last moment during which appellate authority can be exercised

has elapsed: *Chapin v. Broder*, 16 Cal. 403; *Daniels v. Winslow*, 4 Minn. 318; *Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 124.

b. Irregularities in Docketing.—Statutes requiring clerks of courts to keep a judgment docket are directory merely, and the failure of such clerk to comply literally with the statutory direction does not prevent the attaching or continuing of a judgment lien: *Day v. Graham*, 6 Ill. 435; *Carpenter v. Simmons*, 28 How. Pr. 12; *Sharp v. Danville etc. R. R. Co.*, 106 N. C. 308, 19 Am. St. Rep. 533, 11 S. E. 530. A substantial compliance with the requirements of the statute is all that ought to be exacted, and if the statute requires the clerk to docket judgments alphabetically, immaterial inaccuracies of the clerk in making such entries do not defeat the lien of the judgment: *Hesse v. Mann*, 40 Wis. 560. If he inadvertently docket the judgment in a book which has not been in use for some time, so that the entry precedes several judgments previously docketed in the book then in actual use, the entry being otherwise correctly made, the judgment becomes a lien upon the debtor's land: *Hesse v. Mann*, 40 Wis. 560. If the docket shows the date of trial but not the date when the judgment was rendered, the docket entry is sufficient, as it will be presumed that the judgment followed on the day of the trial: *Fulton v. State*, 103 Wis. 238, 74 Am. St. Rep. 854, 79 N. W. 234. The omission of the name of the court does not affect the effect of the docket entry if enough appears to cause cautious purchasers or encumbrancers to make inquiry and full investigation: *Muller v. Flavin*, 13 S. Dak. 595, 83 N. W. 687. Under a statute providing that entries in the judgment docket shall be made so that one shall follow the other in the order of time in which such judgments shall have been rendered, entered, or filed, the order of actual entry, not the mere date on which it appears, determines the legal priority; and a judgment regularly entered in the judgment docket cannot be deprived of its position then acquired by any act of the clerk in putting an earlier date to an entry made afterward lower down the page: *Glasgow v. Kann*, 171 Pa. St. 232, 32 Atl. 1095. A statement of the amounts of a judgment entered in the judgment docket by placing the figures under the heading "amount of judgment," one of the amounts being preceded by the word "costs," and the last two figures of each amount being separated from the others, in the manner usual in account-books, by a vertical red line separating dollars from cents, without any dollar-mark or other designation of money, is a sufficient statement of the amount of the judgment to create a lien: *Dyke v. Bank of Orange*, 90 Cal. 397, 27 Pac. 304. The judgment debtor cannot set up errors in docketing the judgment as destroying its lien if the property has been sold under execution issued on the judgment: *Low v. Adams*, 6 Cal. 277. Error in docketing a judgment in one county which is afterward docketed in another county does not deprive it of the lien it had on defendant's land in the

first county, if the error in the first docket is not sufficient to affect the validity of the lien: *Perry v. Morris*, 65 N. C. 221.

c. Errors or Omissions in Names as Affecting Lien.—As the object of requiring a judgment docket to be kept is to enable intending purchasers and encumbrancers to ascertain whether any judgment lien exists against property in which they may become interested, the name of each judgment defendant must be so written in the docket as to identify him and inform those who examine the docket that his land is subject to the lien. Hence, it is not sufficient to docket the judgment against some of the defendants or to describe it as being against A, B, and others, and if so docketed the lien must be limited to the property of the defendants who are properly named: *Cummings v. Long*, 16 Iowa, 41, 85 Am. Dec. 502; *Hughes v. Lacock*, 63 Miss. 112. But the error of the clerk in misnaming the defendants in the docket-book does not affect the lien of the judgment, unless the encumbrancer was deceived thereby: *Day v. Worland*, 92 Ind. 75. A judgment against a firm, entered on the judgment docket, without setting forth the Christian names of the several partners, although good as between the parties, does not create a lien as against subsequent purchasers and encumbrancers without notice: *York Bank's Appeal*, 36 Pa. St. 458; *Smith's Appeal*, 47 Pa. St. 128; *Hamilton's Appeal*, 103 Pa. St. 368. Omitting the Christian names of the judgment defendants in docketing the judgment is fatal to a claim of lien as regards subsequent purchasers or judgment creditors, though it is good as between the parties: *Ridgway's Appeal*, 15 Pa. St. 177, 53 Am. Dec. 586. A judgment docketed under the first letter of the Christian name, instead of the first letter of the surname of the debtor, when the statute requires an alphabetical docket, is no lien as against a subsequent judgment properly docketed: *Buchan v. Sumner*, 2 Barb. Ch. 165, 47 Am. Dec. 305. The contrary rule prevails in California where it is maintained that if, in docketing a judgment, the clerk omits the Christian name of the judgment debtor, or does not write the names in alphabetical order, the omission does not prevent the docketing from performing its function, making the judgment a lien on the land of the judgment debtor: *Hibberd v. Smith*, 50 Cal. 511. If the name entered in the docket is that by which the defendant is usually known this is sufficient. Hence, a docketing against "A. Jones" creates a lien on the lands of "Abel Jones" if he uniformly writes his Christian name with the initial alone and there is no other "A. Jones" in the county: *Jones' Estate*, 27 Pa. St. 336.

Some of the cases maintain that the omission of the middle name or initial of the judgment defendants from the docket is fatal to it for the purpose of creating a lien: *Johnson v. Hess*, 126 Ind. 298, 25 N. E. 445; *Wood v. Reynolds*, 7 Watts & S. 406; *Davis v. Steeps*, 87 Wis. 472, 41 Am. St. Rep. 51, 58 N. W. 769.

Thus, the docket of a judgment against "William Mankedick" has been maintained to be no constructive notice to a purchaser of land in good faith of which "H. W. Mankedick" is the remote grantor, that the judgment is against "H. W. Mankedick," and a lien on the land: *Johnson v. Hess*, 126 Ind. 298, 25 N. E. 445. And so a docket entry of a judgment against "Edward Davis" has been held to be no constructive notice of a lien on the land of "E. A. Davis," or "Edward A. Davis": *Davis v. Steeps*, 87 Wis. 472, 41 Am. St. Rep. 51, 58 N. W. 769. If a middle initial of defendant's name is used, it must be the proper one, and therefore a docketing against "W. G. Black" creates no lien against the lands of "William A. Black": *Hutchinson's Appeal*, 92 Pa. St. 186. Other cases stoutly maintain that error in, or the omission of, the middle name or initial of the judgment defendants in the entry and docket of the judgment recovered against him does not render it invalid or prevent its becoming a lien upon his real estate as against subsequent purchasers or encumbrancers from him, and in good faith: *Preston v. Wright*, 60 Iowa, 351, 14 N. W. 352; *Geller v. Hoyt*, 7 How. Pr. 265; *Clute v. Emmerich*, 26 Hun, 10. The addition of "junior" being no part of a man's name, it is not essential to the docketing of a judgment against a son, although his father has the same name and resides in the same county: *Bidwell v. Coleman*, 11 Minn. 78.

The proper spelling of the judgment defendant's name is not essential to a sufficient docketing of a judgment against him. All that is demanded in this respect is, that the pronunciation of the name written by the clerk shall correspond with that of the name of the person whose realty is sought to be charged with the lien. Therefore, the docketing of a judgment against "Henry Hickman" creates a lien against the lands of "Henry Heckman": *Bergman's Appeal*, 88 Pa. St. 120. And if in a certain community or vicinity the name "Bubb" is commonly pronounced like "Bobb," the entry and docketing of a judgment against "John Bobb" is sufficient to charge purchasers from "John Bubb" with notice of the judgment lien against his lands: *Myer v. Fegaly*, 39 Pa. St. 429, 80 Am. Dec. 534. Although the identity of sound is preserved, yet the lien may fail if the judgment is docketed under the wrong initial. Thus, while "Yoest" and "Joest" are pronounced alike in the German, searchers for judgment liens against "Yoest" are not bound to look for the name "Joest," nor are they bound to know how such name may be spelled according to rules applicable to foreign languages. The docket must be kept in the English language, and docketing a judgment against "Joest" does not create a lien against "Yoest": *Heil & Lauer's Appeal*, 40 Pa. St. 453, 80 Am. Dec. 590. The question as to whether names spelled very similarly have such identity of sound as to be idem sonans, so that docketing against one is sufficient to create a lien against

the lands of the other, has been presented in several cases, and it has been decided that the names "Binkhead" and "Bankhead": *Anthony v. Taylor*, 68 Tex. 403, 4 S. W. 531; "J. H. Hesse" and "J. H. Hesser": *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297, 42 N. W. 325; and "Helen Desney" and "Ellen Desney": *Thomas v. Desney*, 57 Iowa, 58, 10 N. W. 315—are different names, and that the docketing of a judgment against one is ineffective against the other.

In Alabama, the statute requires that the judgment docket shall show the name of the owner of the judgment, and if such name is omitted by the clerk the docketing is wholly inoperative to create a lien upon the property of the judgment defendant: *Duncan v. Ashcraft*, 121 Ala. 552, 25 South. 735; *Appling v. Stovall*, 123 Ala. 398, 26 South. 212; *Ivy Coal etc. Co. v. Alabama Nat. Bank*, 123 Ala. 477, 26 South. 213.

III. Indexing.

In some of the states the statute requires that dockets showing judgment liens shall be indexed, and the question sometimes arises whether an omission to index or an imperfect indexing is fatal to the lien. In Virginia and West Virginia, after careful consideration, it has been decided that the indexing is not essential to the creation of a docket lien, and this rule is placed upon the ground that the docket and its index are separate and distinct. The judgment creditor, by procuring the entry of record of his judgment in the docket has fully complied with everything required of him by the statute, and upon the further general ground that the index is not an essential part of the record: *Old Dominion Granite Co. v. Clarke*, 28 Gratt. 617; *Caldwell v. Prindell*, 19 W. Va. 604. In a state where the law requires the keeping of a judgment docket containing the names of judgment creditors and judgment debtors alphabetically arranged, it has been determined that the failure to re-enter the names in the general index does not impair the lien of the judgment, for the reason that the entry in the judgment docket is sufficient to give constructive notice of the judgment and of its lien: *Hamilton v. Whitney*, 19 Neb. 303, 27 N. W. 125. In a majority of the states, however, the proper indexing of the defendant's name, or its entry under the proper letter in the judgment docket, as required by the statute, is indispensable to the creation of a lien as against subsequent purchasers or encumbrancers from the judgment debtor, in good faith, for value, without notice: *Sterling Mfg. Co. v. Early*, 69 Iowa, 94, 28 N. W. 458; *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297, 42 N. W. 325; *Metz v. State Bank of Brownville*, 7 Neb. 165; *Valentine v. Britton*, 127 N. C. 57, 37 S. E. 74; *Nye v. Moody*, 70 Tex. 434, 8 S. W. 606.

IV. Justices' Dockets.

In relation to judgment dockets of justices of the peace it may be said that the strictness required in keeping the docket of a superior court need not be observed in order to make the docket good and valid for all purposes for which it may be kept. Every reasonable presumption must be indulged to uphold the jurisdiction and proceedings of a justice of the peace. Hence, the failure of the justice to sign his name to the judgment entered on his docket does not render the judgment void: *Fulton v. State*, 103 Wis. 238, 74 Am. St. Rep. 854, 79 N. W. 234. Nor does the fact that the justice signs his judgment docket with his initials instead of his full name avoid the judgment: *Gunn v. Tackett*, 67 Ga. 725. A statute requiring the entry of a judgment in a docket of a justice of the peace is directory merely: *Hickey v. Hinsdale*, 8 Mich. 267, 77 Am. Dec. 450. Hence his neglect to perform the duty enjoined upon him by statute of entering his judgment in his docket does not invalidate a judgment rendered by him and entered upon the minutes of the trial: *Fish v. Emerson*, 44 N. Y. 376. If the judgment entry on the docket, though informal, names the parties and the amount of the judgment, it is sufficient: *Stokes v. Coonis*, 4 N. J. L. 159; *Elliott v. Jordan*, 7 Baxt. 376; *Wahrenberger v. Horan*, 18 Tex. 57. But it has also been maintained that the docket entry of a justice's judgment must be as certain in matters of substance as the judgment of a court of record, and therefore that under the proper entitling of a cause with the names of the parties, a docket entry of an award of judgment in the following form: "It is therefore considered that the said P. recover of the said D. the sum." etc., is not sufficient as not showing with certainty in whose favor and against whom such judgment was rendered: *Rood v. School District*, 1 Doug. (Mich.) 502. The stability of this ruling may well be doubted. A recital in a justice's docket of the service of summons and rendition of judgment does not of itself establish jurisdiction of the person of the defendant, so as to sustain an action upon a judgment by default rendered by a justice of the peace: *Fisk v. Mitchell*, 124 Cal. 359, 57 Pac. 149. The entry of the judgment in the justice's docket is the best evidence of the judgment, but it is not the judgment itself: *Hickey v. Hinsdale*, 8 Mich. 267, 77 Am. Dec. 450. It is not absolutely necessary for the docket entry of the justice of the peace to show the time when a judgment was entered; and although no date is noted on the margin or in the body of the docket as to the time when the judgment was in fact recorded, it is nevertheless valid, if sufficient appears to show that it followed in consecutive order after the hearing of proof, and upon the same day that the case was tried: *Fulton v. State*, 103 Wis. 238, 74 Am. St. Rep. 854, 79 N. W. 234. Under a statute it may become the duty of the justice to render judgment and enter it in his docket within four days after the case is submitted to him for final decision, and a rendition of judgment and docket entry of the judgment after the four days is void: *Watson*

v. Davis, 19 Wend. 371; unless the provision of the statute is waived by the parties to the suit, which may be done by them, and then the entry may be made after the time specified in the act, if done within the time agreed upon: Barnes v. Badger, 41 Barb. 98. Or if the justice makes a memorandum of the judgment rendered within the four days, the judgment is regular and valid, although he makes no entry thereof on his docket until after the lapse of the four days: Walrod v. Shuler, 2 N. Y. 134. And although the statute requires that judgment be rendered and entered forthwith upon return of verdict, a judgment rendered in due time cannot be reversed because not entered in the docket until two or three days thereafter: Hall v. Tuttle, 6 Hill, 38, 40 Am. Dec. 382; Conwell v. Kuykendall, 29 Kan. 707. In California, and perhaps generally, docketed judgments of justices of the peace do not become liens on the real estate of the judgment debtor until a certified copy of the judgment has been recorded in the office of the county recorder. Hence, the filing and recording in such office of copies of the docket entries made by the justice does not constitute a judgment lien on the real estate of the judgment debtor: Bagley v. Ward, 27 Cal. 369. Because, as we have seen, the docket entry is not the judgment: Hickey v. Hinsdale, 8 Mich. 267, 77 Am. Dec. 450.

EX PARTE WYGANT.

[39 Or. 429, 64 Pac. 867.]

NUISANCE.—CEMETERIES are not nuisances except conditions be present which corrupt or foul the atmosphere by unwholesome or noxious stench, or impregnate the water of wells or springs in the vicinity by percolation through the soil, thereby endangering the public health. (p. 674.)

NUISANCE.—A CEMETERY is not a nuisance per se, and whether the act of burying a dead body is the commission of a nuisance depends entirely upon its proximity to the habitations of the living, and the manner in which it is accomplished. (p. 674.)

NUISANCE.—CEMETERIES—POWER OF MUNICIPALITY. Under a charter authorizing a city to declare what shall constitute a nuisance, it cannot arbitrarily declare that to be a nuisance which is not so in fact, or made so by statute. Hence it cannot declare generally that the burial of the dead in any portion of the city shall constitute a nuisance, when interments may be made in the usual way in some sections thereof, without giving offense to the senses of any human inhabitant, or endangering the health of the community. (p. 674.)

NUISANCE.—CEMETERIES—ORDINANCE RELATING TO. Under a charter authorizing municipalities to provide for the health, cleanliness, peace, and good order of the city, and to prevent and remove nuisances, a city may prescribe reasonable rules respecting the place and manner of burials within its limits, but it cannot arbitrarily prohibit them, unless such prohibition is a reasonable exercise of the power. (p. 674.)

MUNICIPAL CORPORATIONS—ORDINANCES—PRESUMPTION.—A municipal ordinance is presumed to be reasonable (p. 675.)

MUNICIPAL CORPORATIONS—BOUNDARIES.—JUDICIAL NOTICE may be taken of statutes creating municipal corporations and of the extent of their limits as fixed thereby. (p. 676.)

MUNICIPAL CORPORATIONS—ORDINANCE PROHIBITING BURIALS.—Under charter power to provide for the health, cleanliness, and good order of the city, an ordinance prohibiting the interment of dead bodies within the city limits, if unreasonable as applied to sparsely inhabited sections thereof, and general in its scope and operation, is wholly void. (p. 677.)

J. M. Long, city attorney, R. R. Duniway, and J. K. Kollock, for the appellant.

R. Stott, W. L. Boise, and G. C. Stout, for the respondent.

432 WOLVERTON, J. 1. The plaintiff bases his argument in support of the judgment of the circuit court upon the ground that Ordinance No. 9188 is invalid, for the reason that the charter does not authorize the city of Portland to declare the burial of the dead within the city limits, outside of the excepted districts, to be a nuisance, or to punish persons for doing the acts thereby declared to be offenses against the city. It may be premised that a cemetery is not a nuisance, except conditions be present which corrupt or foul the atmosphere by unwholesome or noxious stenches, or impregnate the water of wells or springs in the vicinity by percolation through the soil, thereby endangering the public health; hence the authorities agree that it is not, nor can it be, regarded a nuisance per se: Wood on Nuisances, sec. 6; 1 Dillon on Municipal Corporations, 4th ed., sec. 373; 5 Am. & Eng. Ency. of Law, 2d ed., 791; Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14, and note; Henry v. Trustees, 48 Ohio St. 674, 30 N. E. 1122; Town of Lake View v. Rose Hill Cem. Assn., 70 Ill. 191, 22 Am. Rep. 71. And whether the act of depositing a dead body in its place of sepulture is the commission of a nuisance depends entirely upon its proximity to the habitations of the living and the manner in which it is accomplished.

2. In so far as the language of the charter conferring power upon the city to declare what shall constitute a nuisance is involved by the contention, the case of Grossman v. City of Oakland, 30 Or. 478, 60 Am. St. Rep. 832, 41 Pac. 5, is precisely in point. Within **433** the scope of the doctrine there announced and settled, the city is not thereby authorized to declare that to be a nuisance which is neither such

per se nor under the common law, nor made so by statutory enactment. It would seem to follow, therefore, that the city council was not authorized to declare generally that to deposit a dead body in any portion on the inhibited district shall constitute a nuisance, when it is conceded, as here, that such an interment may be made in the usual way in some sections thereof, without giving offense to the senses of any human inhabitant, or endangering in the least measure the health of the community.

3. Defendant's counsel insist, however, that the authority requisite for excluding burials from within the city limits may be referable to the general police power incident to all municipal corporations, and, beyond this, it is urged that the words of the charter, "to provide for the health, cleanliness, ornament, peace, and good order of the city," are commensurate for the purpose. The power thus conferred is no doubt ample to authorize the city to adopt reasonable measures prescribing rules and regulations as it respects the place and manner of burials within the city limits; but the city cannot arbitrarily prohibit them, unless such prohibition be a reasonable exercise of the power. The legislature, in its wisdom, may, by express delegation of authority, empower the city to adopt measures of a specified and defined character, and the exercise of such authority cannot be questioned on the ground of its unreasonableness. *People v. Pratt*, 129 N. Y. 68, 29 N. E. 7, *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564, and *Coates v. Mayor etc.*, 7 Cow. 585, are illustrative of the principle. In the first, the authority delegated was "to make, modify, and repeal ⁴³⁴ ordinances and by-laws to regulate the burial of the dead"; and it was held that the power to regulate was tantamount to the power to prohibit, the court referring to *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564, which involved the authority to prohibit the operation of slaughter-houses in certain portions of the city of Albany as conclusive of the point. So, in the last case cited, the authority extended to making by-laws "for regulating . . . or preventing the interment of the dead" within the city, which language is so express and explicit as to leave no doubt touching the power to prohibit. But where the authority to adopt specific measures is referable merely to the general power, or where the authority to legislate with respect to a given subject is conferred and the mode of its exercise is not prescribed, there goes with it the condition that the exercise thereof, to be valid and efficacious, must be rea-

sonable, and not oppressive: 1 Dillon on Municipal Corporations, 4th ed., sec. 328; *State v. Inhabitants of Trenton*, 53 N. J. L. 132, 28 Atl. 1076; *Haynes v. Cape May*, 50 N. J. L. 55, 13 Atl. 231; *Coal Float v. City of Jeffersonville*, 112 Ind. 15, 13 N. E. 115; *Mayor etc. v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Tugman v. City of Chicago*, 78 Ill. 405; *Kirkham v. Russell*, 76 Va. 956. It is for the court to determine, in view of the facts of each particular case as it arises, whether or not an ordinance is reasonable: 17 Am. & Eng. Ency. of Law, 1st ed., 248.

4. The prevailing presumption, however, is in favor of its reasonableness, which must be overcome by legal and competent proof to the contrary before its invalidity can be declared: *State ex rel. v. Inhabitants of Trenton*, 53 N. J. L. 132, 20 Atl. 1076; *Commonwealth v. Patch*, 97 Mass. 221; *Van Hook v. City of Selma*, 70 Ala. 361, 45 Am. Rep. 85.

⁴³⁵ 5. We are thus brought to the question whether the ordinance involved evinces a reasonable exercise of the general police power vested in the city, or of such as is attendant upon the power accorded to provide for the health, cleanliness, and good order thereof. The court may take judicial knowledge of the acts of incorporations and charters of municipal corporations, and, as a logical consequence, of the territorial limits of such municipalities, especially where they are fixed and defined by the acts giving them life, or acts amendatory thereof: 17 Am. & Eng. Ency. of Law, 2d ed., 936, 938; *Fauntleroy v. Hannibal*, 1 Dill. 118, Fed. Cas. No. 4691; *Blinkert v. Jansen*, 94 Ill. 283; *Hornberger v. State*, 47 Neb. 40, 66 N. W. 23; *De Baker v. Southern Cal. Ry. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610; *City of Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773.

6. Now, it is an admitted fact that there are considerable tracts of land, comprised within the limits of the city, which are sparsely inhabited. As was said by the court below, "there are within the corporate limits of the city of Portland several large tracts of land, which are used solely for farming purposes, some of them containing several hundred acres, and on some of them interments could be made which would be distant a half mile or more from any human inhabitant or public thoroughfare." Under these conditions, it is assuredly not a reasonable regulation, as a police provision, or for the conservation of the health or good order of the community, to exclude burials from the whole territory, save the districts enumerated by the ordinance. If, however, as before indi-

cated, the legislature had granted special and express power to exclude burials from within the city limits, the adoption of such an ordinance would be a legitimate exercise thereof, and no one could question its ⁴³⁶ validity, yet, when the nature of the power delegated enjoins upon the city the duty of adopting such measures only as are reasonable, that becomes the measure and limit of the power, and any act in excess thereof is without legal efficacy. The ordinance being unreasonable as applied to those sparsely inhabited portions of the city, and general in its territorial scope and operation, it is invalid as to the whole, and must fall in its entirety. As sustaining the conclusions here reached, see *Austin v. Murray*, 16 Pick. 121; *Kneedler v. Borough of Norristown*, 100 Pa. St. 368, 45 Am. Rep. 383; *Town of Lake View v. Rose Hill Cem. Co.*, 70 Ill. 191, 22 Am. Rep. 71; *Mayor etc. v. Radecke*, 49 Md. 217, 33 Am. Rep. 239.

This statement of the law is not impinged upon by the doctrine maintained in *Pennsylvania R. Co. v. Mayor etc. of Jersey City*, 47 N. J. L. 286; *State v. Sheppard*, 64 Minn. 287, 67 N. W. 62, and other cases cited by counsel. One of the primary essentials of a valid ordinance is that it must be general in its operation; that is, it must affect all persons alike, under like circumstances and conditions: 1 *Dillon on Municipal Corporations*, 4th ed., sec. 322. It may, and often does, become a question whether certain persons or corporations, acting in peculiar capacities or special emergencies, come within the legitimate purview or spirit of the ordinance, and such was the question presented and determined by the above cases. The ordinance in each case was general in its scope, affecting all persons alike, but in the first the business of the railroad concentrated in a small compass, but had grown to such proportions that the ordinance became unreasonably embarrassing and burdensome, and it was held, therefore, that it should not be enforced against the company as to the particular locus in quo. So, in the latter case, the ordinance prohibited the driving of animals in the street at a rate of speed exceeding ⁴³⁷ six miles an hour, and it was held that a fireman, acting in the discharge of his duties in hastening to the scene of a conflagration, did not come within the inhibition. The doctrine is operative in the establishment of an exception rather than that of a general rule, and can have no application in the case at bar.

Reliance is had upon the case of *City of Portland v. Terwilliger*, 16 Or. 465, 19 Pac. 90, as being an adjudication sus-

taining the power of the city to exclude burials from within the city limits. The court there had under consideration the effect of an ordinance prohibiting the burial of the dead within the city, and consequently upon an estate conceded, for the purpose of the case, to have been vested in the municipality upon a condition subsequent as to the continued use and occupation thereof by it for cemetery purposes. The power to adopt the ordinance in that case seems to have been taken for granted, or, at least, it was not a matter of controversy in the course of the hearing. In announcing the opinion, Mr. Justice Strahan incidentally says: "That power was delegated by the state to the city of Portland under the general description of police power"; referring, we presume, to the power of prohibiting burials within the city limits. The learned justice then proceeded to an elaboration of the idea that every citizen holds his property subject to the proper exercise of the power, but the question whether the charter did or did not confer the power to adopt the ordinance was not mooted, so far as we are informed by the record, much less can it be said to have been decided. The idea of declaring the act of burial a nuisance, and the power commensurate to that particular purpose, does not seem to have been suggested at any time during the proceeding. The case is therefore not controlling as a precedent. If, however, it ever had any vitality in the direction claimed for it, it must ⁴³⁸ be considered as overruled in its general scope by the subsequent case of *Grossman v. City of Oakland*, 30 Or. 478, 60 Am. St. Rep. 832, 41 Pac. 5. There will be an affirmance of the judgment.

POWER OF MUNICIPALITIES TO REGULATE, PROHIBIT OR DISCONTINUE CEMETERIES.

I. Regulations.

- a. Limitations on Power of.
- b. What Statutes Confer Power of.
- c. What Regulations are Void Because Unreasonable.

II. Prohibition.

- a. When Reasonable and therefore Valid.
- b. When Unreasonable and therefore Void.
- c. As to Persons Who may Maintain or Conduct.
- d. Injunctions Against Enforcement of Invalid.

III. Abolishment or Discontinuance.

I. Regulation.

- a. Limitations on Power of.—Undoubtedly, cemeteries are within the power of reasonable regulation by cities, counties, and towns.

but they are not to be regarded as nuisances per se, in measuring the extent of the police power to regulate them: *County of Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Bogert v. City of Indianapolis*, 13 Ind. 134; *Musgrove v. Catholic Church*, 10 La. Ann. 431; *New Orleans v. Wardens of the Church*, 11 La. Ann. 244; *Commonwealth v. Fahey*, 5 Cush. 408; *Coates v. Mayor*, 7 Cow. 585; *City Council of Charleston v. Wentworth St. Baptist Church*, 4 Strob. 306; *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528. If land is dedicated to public use as a burying-ground, the power of the city over it under such dedication is only for the protection and regulation of the public use and the public health: *Stockton v. Mayor of Newark*, 42 N. J. Eq. 531, 540, 9 Atl. 203. While the legislature may, under the exercise of the police power, and for the purpose of protecting the public health, control and regulate the use of lands in the populous part of a city as a cemetery, or may authorize the city itself to exercise such power, the power cannot be exercised arbitrarily; and all ordinances looking to such regulation must be fair and reasonable, otherwise they are void: *County of Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Austin v. Murray*, 16 Pick. 121; *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528. And an ordinance passed pursuant to a constitutional grant of power to make police regulations concerning cemeteries may be reasonable when confined to the limits of a city or town, but entirely unreasonable when put in operation in all parts of a large county, thinly populated in many of its parts: *County of Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153. A municipal ordinance limiting the places within a city in which it shall be lawful to inter deceased human bodies is not void on its face, and it is valid unless it unreasonably restricts the rights of its citizens to procure places for that purpose within such limits, and a person who claims that such an ordinance is unreasonable must assume the burden of proving it to be so: *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528.

b. **What Statutes Confer Power of.**--Power to forbid the interment of bodies within specified limits of the city is conferred upon a municipality by a charter authorizing it to regulate the burial of the dead, and to purchase, establish, and regulate one or more cemeteries within or without the city limits: *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528. A statute giving the common council of a city the power to regulate or prohibit interments except in cemeteries theretofore established, relates only to interments within the corporate limits. Hence the city authorities have no power to regulate burials, or prohibit the establishment of cemeteries outside the city limits, nor have they any control over them when established: *Begein v. City of Anderson*, 28 Ind. 79. Such a statute does not empower the city

council to subject to the control of the city sexton cemeteries other than those belonging to the city: *Bogert v. City of Indianapolis*, 13 Ind. 134.

A statute requiring a city to transfer a cemetery to another corporation is unconstitutional if the property used as a cemetery was purchased and improved by the city, and it had the right to hold the cemetery not only for the burial of poor persons, but also with the right to make sales of burial rights to any persons who might wish to purchase them, whether residents or nonresidents: *Mount Hope Cemetery v. City of Boston*, 158 Mass. 509, 35 Am. St. Rep. 515, 33 N. E. 695. If a city accepts land dedicated for the purpose of a burial ground and used for that purpose, the city cannot appropriate the ground to any other purpose: *Rousseau v. City of Troy*, 49 How. Pr. 492. If township trustees have bought land for a cemetery, they still have a discretion as to its use, and cannot be compelled by mandamus to devote it to cemetery purposes if for any reason they deem it unsuitable: *Christy v. Whitmore*, 67 Iowa, 60, 24 N. W. 593. Nor can they be enjoined from selling the land, when they propose to sell it only on condition that it shall not be used for cemetery purposes: *Bushnel v. Whitlock*, 77 Iowa, 285, 42 N. W. 186. If a statute provides that no cemetery shall be established within city limits without first obtaining the consent of the city authorities, a written communication, addressed to the mayor and common council of the city by the proper persons, asking that permission be granted them to maintain a cemetery on certain land, is a sufficient application, and the consent of the municipal authorities in such case is sufficiently given by the adoption of a motion to that effect by the common council without the enactment of an ordinance granting such permission: *Porch v. St. Bridget's Congregation*, 81 Wis. 599, 51 N. W. 1007.

c. **What Regulations are Void Because Unreasonable.**—A county ordinance which makes it unlawful to establish, extend, or enlarge any cemetery within the limits of the county without the permission of the supervisors, but which impliedly permits burials in cemeteries already established, without restriction, is invalid and unenforceable by the county. It is unreasonable, because it makes the right to follow a lawful occupation dependent upon the arbitrary will of the supervisors, and it is unequal in its operation because it discriminates in favor of a class of persons within the same district, as it allows the owners of cemeteries already established the right to exercise privileges denied to those who have no permission, and whether the permission may or may not be granted rests in the arbitrary power of the supervisors: *County of Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153. The use of land as a cemetery, if such use is not a nuisance, cannot be enjoined on allegations that such use renders adjoining land and property less valuable: *Dunn v. City of Austin*, 77 Tex. 139, 11 S. W. 1125.

II. Prohibition.

a. When Reasonable and Therefore Valid.—The legislature, in the exercise of its police power, can lawfully prohibit the use of lands for the purpose of burial, when such lands are held by a municipal corporation: *Mayor of Newark v. Watson*, 56 N. J. L. 667, 29 Atl. 487. "The prevention of the location of cemeteries in the thickly populated portions of the country, or where such condition is probable, or near dwelling-houses actually existing, has generally been considered a proper exercise of police power when regulations in that regard have been challenged on constitutional grounds": *Pfleger v. Groth*, 103 Wis. 104, 79 N. W. 19. The owner of a lot within a cemetery, who has purchased it for the purpose of burial, holds it subject to the right of the city to prohibit further burials within the cemetery, when such action is demanded by the necessities of the public health: *Coates v. Mayor of New York*, 7 Cow. 585. Thus an ordinance prohibiting the establishment of any new burial grounds within the limits of the city may be constitutional and valid: *City Council of Charleston v. Wentworth St. Baptist Church*, 4 Strob. 306. An ordinance providing that no land except that already so used and appropriated shall be used for burial purposes other than private tombs, unless by permission of the town authorities, is constitutional, and extends to corporations for burial purposes whose charters do not exempt them from the control of the legislature in the exercise of its police power for the security of the public health and comfort: *Woodlawn Cemetery v. Everett*, 118 Mass. 354. An ordinance prohibiting the interment of dead human bodies within specified limits of a city, if a reasonable exercise of the police power for the preservation of the public health, is valid: *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528. Cities have complete authority to establish cemeteries, and this implies a discretion to judge of their necessity and the place of their locality: *Greencastle v. Hazelett*, 23 Ind. 186; *Camp v. Town of Barre*, 66 Vt. 495, 29 Atl. 811.

b. When Unreasonable and Therefore Void.—Power vested in city authorities to abate nuisances does not include power to forbid by ordinance any cemetery to be opened in the town without permission, when it is sought to establish such cemetery in a proper locality: *Lake View v. Letz*, 44 Ill. 81. The location of a cemetery at a certain place cannot be prohibited if found to be a public necessity and convenience, and that its location will not be detrimental to public health: *Application of St. Bernard etc. Cemetery Assn.*, 58 Conn. 91, 19 Atl. 514. A statute cannot prohibit the use of land for cemetery purposes if granted for that purpose, unless the public health requires it. Thus the charter of a cemetery company authorized it to acquire and use land not exceeding five hundred acres for burial purposes. After it had acquired the land and improved it, a statute was passed prohibiting

the company from using any of its land for cemetery purposes outside its then inclosure, which was less than five hundred acres, and the court held that as it did not appear that any nuisance existed or was liable to arise, the statute was not a valid exercise of the police power, and was unconstitutional and void: *Lake View v. Rose Hill Cemetery Assn.*, 70 Ill. 191, 22 Am. Rep. 71. In *Austin v. Murray*, 16 Pick. 121, an ordinance prohibited any person from bringing into the city any dead body or cause the same to be conveyed through the streets or to be buried on the premises of such person or elsewhere within the town, without a permit from the selectmen of the town, and the court said that if the ordinance had been limited to the populous part of the town, and had been made in good faith "for the purpose of preserving the health of the inhabitants, which may in some degree be exposed to danger by the allowance of interment in the midst of a dense population, it would have been a very reasonable regulation. But it cannot be pretended that this by-law was made for the preservation of the health of the inhabitants. Its restraint extends many miles into the country to the utmost limits of the town. Such an unnecessary restraint upon the right of interring the dead we think essentially unreasonable." A municipal ordinance not prohibiting all burials within the city limits, but assuming to prohibit further purchases of cemetery lots and further interments for general purposes, but expressly excepting interments in such lots or plots as have been already purchased for the use of purchasers or their families, and making the violation of the ordinance a misdemeanor, is unreasonable and invalid, as assuming to limit the privilege of burial to one class of citizens, and denying it to another class within the same district: *Ex parte Bohen*, 115 Cal. 372, 47 Pac. 55. "The right to prohibit burials within a certain district rests upon the proposition that any burial within that district is detrimental to the public health, but an ordinance permitting burials within that district to an extent greater in number than it prevents cannot be upheld as a valid exercise of the police power. An ordinance forbidding the burial of human bodies within the city, or upon any designated portion thereof, cannot be sustained, if such burial be permitted upon other lots similarly situated, any more than can an ordinance forbidding the conducting of a soap-boiling factory or any other occupation which may, under certain circumstances, be deleterious to health": *Ex parte Bohen*, 115 Cal. 376, 47 Pac. 55. If an ordinance prohibiting further burials within city limits and the further purchase and sale of lots for burial purposes is valid, the mere purchase and sale of a lot in a cemetery is not a complete offense and cannot be the basis of a crime or misdemeanor, until the offense of burial in such lot has been committed: *Ex parte Bohen*, 115 Cal. 372, 47 Pac. 55. A purchaser of a lot from a private corporation is not bound by an ordinance, enacted after the transfer of the cemetery to the city, prohibiting any grave

from being dug except by permission of the city sexton: *Ritchey v. City of Canton*, 46 Ill. App. 185.

c. **As to Persons Who may Maintain or Conduct.**—If a business, such as conducting a cemetery for profit, is lawful, and has no injurious tendency, the city authorities cannot say who shall and who shall not exercise the right to follow it. Hence any restriction by virtue of the police power, upon the right of individuals to pursue it, must extend to all alike. The privilege of burial cannot be limited to one class of citizens and denied to another class within the same district, nor can the city, under the guise of regulating a business, make prohibition possible by committing to its officers arbitrary power to deny permission to engage in that business: *County of Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153.

d. **Injunctions Against Enforcement of Invalid.**—An injunction against a void municipal ordinance, forbidding and making criminal interments in a cemetery, may be issued by court of equity when there is no adequate remedy at law: *Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 47 Am. St. Rep. 114, 28 S. W. 528.

III: Abolishment or Discontinuance.

A statute or ordinance directing the abolishment or discontinuance of a cemetery as a menace to the public health, and also directing the removal of the bodies and the sale of the land, may be a valid exercise of the police power. Thus, the purchaser of a lot in a cemetery for burial purposes does not take any title to the soil, and an act of the legislature, directing the vacation and sale of the cemetery and the removal of the bodies, is not an unconstitutional infringement of his rights: *Partridge v. First Independent Church*, 39 Md. 631; *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377. The legislature has the right to authorize a municipality to remove the remains of the dead from cemeteries, and an ordinance passed for that purpose does not impair the obligation of a contract as to one who has a right of burial therein: *Craig v. First Presbyterian Church*, 88 Pa. St. 42, 32 Am. Rep. 417. If the further performance of a condition subsequent that premises shall be used as a cemetery is rendered unlawful by a valid statute, the condition is thereby discharged, and the title of the grantee freed therefrom, and property is not taken for a public use within the meaning of the constitution by the enactment and enforcement of a statute forbidding its use in a manner hurtful to the health and comfort of the community. Therefore, though a person has a right of entry for a condition broken that land shall be used for a public cemetery, and the land is freed from that condition under a valid statute forbidding any further interments therein, and requiring the removal therefrom of all bodies and monuments, and authorizing the taking of the property after such removal for a public park upon payment to its owners of the sums decreed by the court, he has no right to any part of the money awarded for such property:

Seovill v. McMahon, 62 Conn. 378, 36 Am. St. Rep. 350, 26 Atl. 479. The legislature, in the exercise of its police power, can lawfully prohibit the further use of lands for burial purposes: *Mayor of Newark v. Watson*, 56 N. J. L. 667, 29 Atl. 487. In *Youngs v. Commissioners*, 51 Fed. 585, the lands were donated by the owner of the fee to a municipality for a burying-ground, and the municipality subsequently passed an ordinance prohibiting the further use of it for such purpose. The ordinance was declared to be a valid exercise of the police power, and also to operate as a complete abandonment of the dedicated use, by which the lands reverted to the original owner. The legislature has power to prohibit interments in, or the removal of, the dead from cemeteries which, in view of the advance of urban population, may be detrimental to the public health or in danger of becoming so, and every owner of a cemetery lot must be deemed to have purchased it, and to hold it for the sole purpose of using it as a place of burial, and he is bound to know at his peril that it may become offensive by reason of the residence of many people in its vicinity, and that such use must yield to laws for the suppression of nuisances. Every lot owner holds his title subject to that contingency, and no condition or covenant contained in the deed appropriating the land to a particular use can prevent the legislature from declaring such use unlawful, and compelling the removal of all bodies from the ground: *Went v. Methodist Protestant Church*, 80 Hun, 266, 30 N. Y. Supp. 157; affirmed, 150 N. Y. 577, 44 N. E. 1129. The right of burial in a public cemetery is not an absolute right of property, but a privilege or license to be enjoyed only so long as the place continues to be used as a burying-ground, subject to municipal regulation and control and legally revocable whenever the public necessity requires. "The right to provide for the establishment and discontinuance of public cemeteries and regulate their use is a public right, within the control of the legislature, which it may exercise directly, or intrust to local municipal action under such restrictions as are necessary for the protection of public and private rights": *Page v. Symonds*, 63 N. H. 17-20, 56 Am. Rep. 481; *Humphrey v. Methodist Episcopal Church*, 109 N. C. 132, 13 S. E. 793; *Schlessinger v. Mallard*, 70 Cal. 326, 11 Pac. 728.

In one case, which seems to be opposed to all other authority on the subject, it was judicially determined that if title to certain land is vested in a city merely in trust, for and subject to use as a burial ground forever, such use must be deemed to be perpetual, and the city authorities cannot, even with statutory sanction, destroy it and devote the land to other purposes, for the original use is not subject to legislative revocation: *Stockton v. Mayor of Newark*, 42 N. J. Eq. 531, 9 Atl. 203.

PERRY v. GHOLSON.

[39 Or. 438, 65 Pac. 601.]

JUSTICES' COURTS—EVIDENCE OF ISSUANCE OF SUMMONS.—In the absence of the original summons from the files in a justice's court, the docket entry required to be made by statute at the time of the issuance of the summons is sufficient proof of the date of its issuance. (p. 685.)

PROCESS—DEFECT IN COLLATERAL ATTACK.—If a summons is defective in form only, a judgment based thereon is not open to collateral attack. (p. 686.)

T. A. Hailey, for the appellant.

L. B. Reeder, for the respondent.

⁴³⁹ BEAN, J. This is an action to recover possession of personal property. The defendant, who was acting as a constable, justifies the seizure and detention thereof under a writ of attachment issued out of a justice's court. The plaintiff denies that the writ relied on was duly or regularly issued. At the trial, after plaintiff had rested, defendant, to prove the allegations of his answer, offered in evidence certified copies of the docket entries and papers in the action in which the writ was issued; but the trial court refused to admit them in evidence, because it did not sufficiently appear that a summons had been issued at the time of the issuance of the writ. The following entries appear in the justice's docket, prior to the entry showing the filing of the affidavit and undertaking for the writ of attachment and the issuance thereof: "Summons issued September 19, 1899. Case set for hearing on the twenty-eighth day of September, 1899, at the hour of 1 o'clock in the afternoon." The docket also shows that at the time set for the hearing the defendant in the action appeared specially by his counsel and moved to quash the summons and service thereof, basing such motion upon his affidavit, to which was annexed a copy of a summons in form as required by the act of 1893 (Laws 1893, p. 39), dated September 19, 1899, and which he avers was the only paper served upon him purporting to be a summons. No return was ever made upon the original summons, and it therefore does not appear among the files of the justice's court. The argument is that, to support a writ of attachment issued out of a justice's court, it must appear from the record not only that an entry was made by the justice in his docket that ⁴⁴⁰ a summons had been is-

sued, but that it was such a summons as the law requires, and was delivered to the officer for service prior to the issuance of the writ of attachment, and that the original summons and the indorsement thereon are necessary proof of such facts.

1. A plaintiff in a civil action in a justice's court is entitled to the benefit of the provisional remedy of attachment, as in like cases in courts of record (Hill's Annotated Laws, sec. 2064); and it has been conceded in the argument that a writ of attachment cannot issue from such court until the summons has been issued, so that the only question for decision is the character of proof required of the issuance of the summons. In the circuit court a summons is prepared and signed by the plaintiff or his attorney, and is not deemed issued until it is placed in the hands of the officer, with the intention that it be served upon the defendant, and the only legal evidence of the delivery to the officer is the indorsement which the law requires him to make thereon: Hill's Annotated Laws, sec. 52; *White v. Johnson*, 27 Or. 282, 40 Pac. 511, 50 Am. St. Rep. 726, and note; but in a justice's court the summons is signed and issued by the justice (Laws 1893, p. 39; Laws 1899, p. 109), who is required by the statute to make an entry in his docket of the date of the issuance thereof: Hill's Annotated Laws, sec. 2055. The legal evidence of the fact of the issuance of the summons is thus provided, and, in our opinion, the docket entry is sufficient proof of that fact to support a writ of attachment. Until the summons is returned it is no part of the record, and in its absence the entry in the justice's docket is the only evidence of its issuance. The presumption is that the justice did his duty and made a correct entry in his docket, and we do not think the actual return of the summons is necessary to the validity of the attachment. In cases ⁴⁴¹ arising in the circuit and county courts there is no means provided by which the date of the issuance of a summons can be determined, except by the indorsement of the officer thereon, but in cases arising in a justice's court there is no law requiring the officer to indorse on the summons the date of its delivery to him. The date of its issuance is determined by the time it was actually issued by the justice, and the proof thereof is the entry made by him in his docket.

2. It is also argued that the summons was void because in the form required by the act of 1893, and not the act of 1899, under which the action was brought. But this was a defect in the form only, and a judgment based thereon would not

have been open to collateral attack: *North Pac. Cycle Co. v. Thomas*, 26 Or. 381, 38 Pac. 307, 46 Am. St. Rep. 636, and note; *Van Fleet on Collateral Attack*, 351. The judgment is therefore reversed, and a new trial ordered.

Collateral Attack upon Judgments is discussed in the monographic notes to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119; *Hahn v. Kelly*, 94 Am. Dec. 762-770. An irregularity in the form of the summons will not render a judgment subject to collateral attack: *North Pac. Cycle Co. v. Thomas*, 26 Or. 381, 46 Am. St. Rep. 636, 38 Pac. 307; *Kalb v. German Sav. etc. Soc.*, 25 Wash. 349, post, p. 757, 65 Pac. 559. As against such attack on the ground that the summons was insufficient, it must be presumed that another and sufficient summons was issued and served: *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525; *Bradley v. Drane*, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304.

MATTSON v. ASTORIA.

[39 Or. 577, 65 Pac. 1066.]

CONSTITUTIONAL LAW—DENIAL OF REMEDY.—Although a statute may change the remedy or the form of procedure, attach conditions precedent to its exercise, and abolish old and substitute new remedies, it cannot deny a remedy entirely. (p. 688.)

CONSTITUTIONAL LAW—DENIAL OF REMEDY—INJURY FROM DEFECTIVE STREET.—A city charter giving to the municipal council control of the streets, and providing that neither the city nor any member of the city council shall be held liable for any damage resulting from any defective street, thus denying any remedy for the negligence of the council, is void, as being in conflict with a constitutional guaranty to every person of a remedy by due course of law for any injury done him. (p. 688.)

A. M. and J. H. Smith, for the appellant.

F. L. Keenan and G. Noland, for the respondent.

578 BEAN, J. This is an action against the city of Astoria to recover damages for an injury alleged to have been caused by its failure to keep one of its public streets in repair and suitable for travel. The validity of a clause of the city charter exempting the city and the members of the council from liability in such cases is the only question presented by this appeal. By its charter, the city, the power and authority of which are vested in the mayor and common council (*Laws* 1891, p. 280), is given control and management of the streets, and authority to raise money for their improvement and repair (*Laws* 1895, p. 556, secs. 75, 77, 79); and the common

council is vested with the express authority "to assess, levy, and collect taxes for general municipal purposes," and to provide "for the cleaning and repairing" of streets: Laws 1895, p. 564, sec. 38. The charter also provides that "neither the city of Astoria nor any member of the council thereof shall in any manner be held liable for any damages resulting from a defective condition of any street, alley, or highway thereof": Laws 1895, p. 572, sec. 149. The court below held this clause void, because repugnant to the state constitution (article 1, section 10), which provides that "every man shall have ⁵⁷⁹ remedy by due course of law for injury done him in person, property, or reputation," and in this view we concur. That it is within the power of the legislature to exempt a city from liability to persons receiving injuries on account of streets being defective or out of repair is unquestioned: *O'Hara v. City of Portland*, 3 Or. 515. But in such case the injured party is not wholly without remedy. He may proceed personally against the officers to whom the charter delegates the duty of keeping the streets in repair, and from whose negligence the injury resulted. "It is settled law in this court," says Mr. Justice Finch, "that one who assumes the duties and is invested with the powers of a public officer is liable to an individual who sustains special damage by a neglect properly to perform such duties": *Bennett v. Whitney*, 94 N. Y. 302. Mr. Justice Swayne says: "The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct": *Amy v. Supervisors*, 11 Wall. 136. See, also, 1 *Shearman and Redfield on Negligence*, 5th ed., sec. 313; 1 *Dillon on Municipal Corporations*, 4th ed., 325, note; *Rankin v. Buckman*, 9 Or. 253; *Ball v. Woodward*, 51 Fed. 646; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Hover v. Barkhoof*, 44 N. Y. 113; *Tearney v. Smith*, 86 Ill. 391; *Butler v. Ashworth*, 102 Cal. 663, 36 Pac. 922; *Nowell v. Wright*, 3 Allen, 166, 80 Am. Dec. 62. A provision, therefore, of the city charter exempting the city from liability for damages resulting from defective streets is not violative of the constitutional provision referred to, because it does not wholly deny the injured party a remedy for the wrong suffered.

The charter provision in question, however, goes further. It provides that neither the city nor any member ⁵⁸⁰ of

the council shall be liable, and, if valid, prevents a common-law action against the members of the council for their negligent acts or omission, and is practically, therefore, a denial of any remedy, as they are the only officers charged with the duty of keeping the streets in repair. The constitutional provision guaranteeing to every person a remedy by due course of law for injury done him in person or property is found in the constitutions of many of the states, and means, as said by the supreme court of Missouri, "that for such wrongs as are recognized by the law of the land the courts shall be open and afford a remedy" (*Landis v. Campbell*, 79 Mo. 433, 439, 49 Am. Rep. 239); or, as interpreted by the supreme court of Wisconsin, "that laws shall be enacted giving a certain remedy for all injuries or wrongs": *Flanders v. Town of Merrimack*, 48 Wis. 567, 575, 4 N. W. 741. It was intended to preserve the common-law right of action for injury to person or property, and while the legislature may change the remedy or the form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies (*McClain v. Williams*, 10 S. Dak. 332, 73 N. W. 72; *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792), it cannot deny a remedy entirely. It is immaterial, therefore, whether a municipal corporation is technically liable at common law for negligence in not keeping its streets in repair, because, as said by Mr. Justice Earl, in *Fitzpatrick v. Slocum*, 89 N. Y. 358, "there must be a remedy in such a case, where one is injured, without any fault of his own, by a defect in one of the streets or bridges of the city—either against the city or some one of its officers." And the charter of Astoria attempts to deny both. Whether a municipal corporation was liable to a common-law action or not, its officers were so liable to an individual specially damaged by their negligent act or omission; ⁵⁸¹ and the charter provision under consideration attempted to take away the remedy against the officers, as well as against the city, and is therefore void.

Affirmed.

The Legislature may Change the formalities of legal procedure, but it cannot make changes so as to impair the enforcement of rights: *Brown v. Buck*, 75 Mich. 274, 13 Am. St. Rep. 438, 42 N. W. 827; *Kirkman v. Bird*, 22 Utah, 100, 83 Am. St. Rep. 774, 61 Pac. 338; *Merchants' Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715, 32 S. E. 481; *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022. A purely statutory right, however, may be taken away entirely: *Relyea v. Tomahawk Paper etc. Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

CROWLEY v. GROONELL.

[73 Vt. 45, 50 Atl. 546.]

WILD ANIMALS—OWNER'S LIABILITY.—The owner of a beast *ferae naturae*, which gets loose and does harm to any person, is liable therefor, though he had no particular notice that the animal had done any such thing before. (p. 690.)

DOMESTIC ANIMALS—OWNER'S LIABILITY.—If the owner of a domestic animal has notice of its propensity to commit the class of injuries complained of, he must restrain it at his peril. And it is no answer that the animal was not cross or savage and acted in good nature and playfulness. (pp. 690, 691.)

DOGS—OWNER'S LIABILITY.—A cross and savage disposition on the part of a dog is not necessary in order to impose liability on its owner for its assault; a mischievous propensity is enough, if the case is otherwise made out. It makes no difference, in respect to the liability, whether the assault proceeds from good or ill nature, from playfulness or ugliness. (pp. 690, 693.)

Action for injury by the defendant's dog. It appeared that while the plaintiff was going upon the defendant's premises, for business purposes, the dog assaulted him by jumping up and putting his feet against him, throwing him down, and breaking his hip. The evidence was conflicting as to whether the assault was vicious or playful, and as to the propensities of the dog known to the plaintiff. Judgment for the plaintiff, and the defendant excepted.

G. E. Lawrence and G. L. Rice, for the plaintiff.

Butler & Maloney and Joel C. Baker, for the defendant.

46 WATSON, J. The only exception upon which the defendant relies is the one to that part of the charge where the

court said that a cross and savage disposition on the part of the dog was not necessary in order to impose liability; that a mischievous propensity to commit the kind of assault complained of was enough if the plaintiff's case was otherwise made out; and that in respect to imposing liability, it made no difference whether such assault proceeded from good nature or ill nature, from ugliness or playfulness.

The defendant contends that the duty of restraint attaches only when the owner or keeper has reason to apprehend that the dog may do damage by reason of its viciousness or ferocity, and that the acts of the dog, proceeding from good nature or playfulness, cannot render the defendant liable. If a man have a beast that is *ferae naturae*, as a lion, a bear, a wolf, if he get loose and do harm to any person, the owner is liable to an action for damages, though he have no particular notice that he had done any such thing before. The same principle applies to damages done by domestic animals, except that as to them, the owner must have seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. With notice to the owner of such propensity in the animal, he is liable for whatever damages may be suffered by person or property therefrom. It ⁴⁷ makes no difference whether the animal was of cross and savage disposition and committed the injury by reason of its viciousness and ferocity, or whether such injury resulted from good nature and playfulness—the intent of the animal is not material. The owner or keeper, having knowledge of its disposition to commit such injuries, must restrain it at his peril, and it is no answer to say that the animal was not cross or savage, and was in good nature and playfulness. The law governing such an action is stated by Sir Matthew Hale, that “if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, if the owner know not his quality he is not punishable; but if the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it”: 1 Hale's Pleas of the Crown, 430.

In *Mason v. Keeling*, 12 Mod. 332, Chief Justice Holt said that the difference was between things in which the party had a valuable property, for he should answer for all damages done by them; but of things in which he had no valuable property, if they were such as were naturally mischievous in their kind, he should answer for any hurt done by them without

notice; but if they were of a tame nature, there must be notice of the ill quality, and the law took notice that a dog was not of a fierce nature, but rather the contrary.

In *Read v. Edwards*, 17 Com. B., N. S., 245, it was proved at the trial that the dog which did the damage was of a peculiarly mischievous disposition, it being accustomed to chase and destroy game on its own account, and that that vice was known to its owner, the defendant; that he, notwithstanding, allowed it to be at large in the neighborhood of the plaintiff's wood in which were young pheasants being reared under domestic hens; so that the entry of the dog into the wood and the destruction of the game was the natural and immediate result of the animal's ⁴⁸ peculiarly mischievous disposition, of which the owner had knowledge. The defendant was held liable.

In *State (Evans) v. McDermott*, 49 N. J. L. 163, 60 Am. Rep. 602, 6 Atl. 653, at the close of the plaintiff's evidence, the defendant moved for a nonsuit, on the ground that it did not appear that the dog had bitten McDermott maliciously, and also on the ground that there was no evidence that the dog had bitten other persons except in play, or that the defendant had knowledge of the propensity of the dog to bite. The motion was overruled. It was contended that although several persons had been bitten by the dog, of which the defendant had notice, yet it appeared that in every instance the biting occurred while the dog was in a playful mood; that damages could not be recovered where it was shown that the dog had a propensity to bite only in play; and that to justify a recovery, it must appear that the dog was in the habit of biting mankind while in an angry mood, actuated by a ferocious spirit. It was held that this was not the law—that an action could be maintained against the owner by a party injured upon evidence that a dog, with the knowledge of the owner, had a mischievous propensity to bite mankind, whether in anger or not; for in either case, the person bitten would suffer injury, and that mischievous propensity, within the meaning of the law, was a propensity from which injury is the natural result.

In *Reynolds v. Hussey*, 64 N. H. 64, 5 Atl. 458, it was held to be the propensity to commit the mischief that constitutes the danger, and therefore that it was sufficient if the owner had seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of in-

juries complained of. And that the question in each particular case is, whether the notice was sufficient to put the owner on his guard, and to require him, as an ordinarily prudent man, to anticipate ⁴⁹ the injury which has actually occurred: See, also, *Buckley v. Leonard*, 4 Denio, 500.

There was no error in the charge, and judgment is affirmed.

The Owner of Beasts Ferae Naturae is liable, without actual notice of their propensities, for injuries done by them: *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99.

The Owner of Domestic Animals is not ordinarily liable for injuries done by them, unless he had notice of their vicious propensities: *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99; *Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Dec. 346; *Smith v. Donohue*, 49 N. J. L. 548, 60 Am. Rep. 652, 10 Atl. 150.

The Owner of a Dog is liable for an injury from his bite, upon a showing of the owner's knowledge of his propensity to bite, whether in anger or not: *Evans v. McDermott*, 49 N. J. L. 163, 60 Am. Rep. 602, 6 Atl. 653. But the owner of a peaceable dog is not liable merely because the dog bites a person. Without some fault on the part of the owner, liability does not arise: *Martinez v. Bernhard*, 106 La. 368, ante, p. 306, 30 South. 901.

IN RE CLAFLIN'S WILL.

[73 Vt. 129, 50 Atl. 815.]

WILLS—SIGNATURE AND ITS ACKNOWLEDGMENT.—It is not necessary for a testator to place his name on the will in the presence of attesting witnesses. If he signs it without their presence, and afterward requests them to witness his signature, this is a sufficient acknowledgment. (p. 695.)

WILLS—PUBLICATION.—ANY COMMUNICATION of a testator's intent to give effect to a paper as his will, whether by word, sign, motions, or conduct, is sufficient to constitute a publication. (p. 695.)

WILLS—PUBLICATION.—THE WRITING AND SIGNING of a will, and the superintending of its execution, constitute a sufficient publication thereof by the testator. (p. 695.)

WILLS—KNOWLEDGE OF WITNESSES.—IT IS NOT NECESSARY to show, by the attesting witnesses, that at the time they signed they knew they were witnessing the testator's will. This fact, though necessary, may be otherwise shown. (p. 696.)

WILLS—PRESENCE OF WITNESSES.—If all the witnesses to a will are so situated that they may see one another sign, it is not material whether they do in fact or not. (p. 696.)

WILLS—PROOF OF EXECUTION.—THE CIRCUMSTANCES attending the execution of a will may be such as to control the evidence of the attesting witnesses. (p. 696.)

WILLS—PROOF OF EXECUTION.—WHEN THE ATTESTING witnesses are dead, beyond the reach of process, or unable to recollect the facts essential to a good execution, if their signatures and that of the testator are proved, an attestation clause showing a compliance with the formalities required by law is *prima facie* evidence of the due execution of the will. (p. 696.)

WILLS—PRESUMPTION OF DUE EXECUTION.—If the evidence tends to show that the testator was accustomed to draw and superintend the execution of wills for others, and that he drafted the will in question, with a perfect attestation clause, and superintended its execution with a knowledge of the requirements of law—this raises a strong presumption that such requirements were complied with. (p. 697.)

J. D. Denison, for the proponents.

M. M. Wilson and Darling & Darling, for the contestants.

130 WATSON, J. The probating of the will of Ephraim F. Claflin was contested on the ground that it was not properly executed. The instrument sought to be established as such will was received in evidence, and it was conceded to be in the handwriting of the testator, except the signatures of the witnesses thereto, and the words "Ephraim F. Claflin's Will" on the outside. It purports on its face to have been duly executed. The attestation clause reads, "Signed, sealed, published, and declared by the said Ephraim F. Claflin as his last will and testament in the presence of us who have hereunto subscribed our names as witnesses thereof, at the request and in the presence of the said testator and in the presence of each other"; and it was signed by E. I. Claflin, E. O. Mann, and Josie E. Rand as witnesses. The evidence tended to show that the testator had charge of and superintended its execution, and that he was of ¹³¹ sound mind; that he signed the instrument, and that it was signed by all the witnesses in the store of the witness E. I. Claflin at the testator's request and in his presence. Mann testified that the testator invited him and Mrs. Rand to witness his signature, but did not tell them what the document was, whereupon they signed it in the presence of the testator and in the presence of each other; that the signature of E. I. Claflin was just above where they signed at the time, but that he, Claflin, was not present and did not see them sign, nor were they present when he signed, nor did they see him sign; that E. I. Claflin was about his store there somewhere, but the witness did not know where; that witness had seen him there that day running the store. Referring to the same time and place, the witness also testified: "Q. And you cannot say that Mr. E. I. Claflin was

not there? A. If he was, he was hid; he was not in my sight. Q. You can't tell but what you were in his sight, can you? A. I might have been in his sight, but if I was, I did not see him." Evidence was introduced tending to show declarations of Mann, out of court, to the effect that all of the attesting witnesses were present together and saw one another sign, and that the witness Claflin signed and then went to putting up goods in the store. Evidence was also introduced, of more or less force, tending to show that at the time Mann signed as a witness he knew he was witnessing the testator's will. Mrs. Rand testified that she recognized her signature, but remembered nothing about the matter. E. I. Claflin testified that when he signed as a witness the testator asked him to sign that "document," but did not state what it was; that he supposed at the time from what there happened that he was witnessing the testator's will; that he did not know whether the other witnesses were then present or not, but he did not see them sign. The evidence tended to show that at the time of the execution of this instrument the testator had been accustomed ¹³² to draw wills, and to superintend their execution for other people, and knew the formalities required by law.

At the close of the proponents' evidence a verdict was ordered for the contestants, to which proponents excepted. The evidence, as stated herein, is given in its most favorable light for the proponents. Was it error to order a verdict? is the question.

It was not necessary for the testator to place his name on the paper in the presence of the attesting witnesses. If the will was signed by him without their presence, and he afterward requested them to witness his signature, it was a sufficient acknowledgment of his signature and a compliance with the law in this regard: *Adams v. Field*, 21 Vt. 256; *Baskin v. Baskin*, 36 N. Y. 416. No form of words is necessary to indicate to witnesses that the testator intends to give effect to a paper as his will. Any communication of this idea by word, sign, motions, or conduct is sufficient in law to constitute a publication, and herein every case must depend upon its own peculiar circumstances: *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Ludlow v. Ludlow*, 36 N. J. Eq. 597; *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579.

In the case at bar, the writing and signing of the will, and the superintending of its execution, constituted a sufficient

publication thereof by the testator, and in attesting the will the witnesses attested its publication: *Dean v. Dean*, 27 Vt. 746. In *Ilott v. Genge*, 3 Curt. Ecc. 181, Sir Herbert Jenner Fust said: "This is a determination that where a testator had written a will himself, and signed it, and produced that will, so signed (for this is a point never to be lost sight of) to witnesses, and desires them to sign their name, that amounts to an acknowledgment that the paper signed by them is his will, and the instrument is complete for its purpose; it is acknowledged by the testator to be his will." Nor was it necessary to show ¹³³ by the attesting witnesses that at the time they signed, they knew they were witnessing the testator's will. This fact, though necessary (*Roberts v. Welch*, 46 Vt. 164), may be shown by other witnesses, or it may be inferred from the circumstances. Six years elapsed between the time of the execution of the will in question and the trial in the court below. One of the attesting witnesses recognized her signature, but could recollect nothing about the matter. The testimony of the other attesting witnesses fell short of showing a duly executed will. Their evidence shows a defective memory as to the whereabouts of the witness Clafin when the other witnesses signed, and they deny the presence of the other witnesses when he signed. Impeaching evidence was introduced affecting the weight of their testimony. That they all signed at the testator's request in Clafin's store and that Clafin was about there somewhere looking after his business, is apparent from the evidence. If all of the witnesses were so situated that they might have seen one another sign, it is not material whether they did in fact or not: *Blanchard v. Blanchard*, 32 Vt. 62. As the case stood, the circumstances attending the signing by the witnesses were of much force, and might be controlling; for "if all the subscribing witnesses testify that the will was not duly executed, the parties will be allowed to go into circumstantial evidence to prove its due execution": *Dean v. Dean*, 27 Vt. 746. Nor was this all. When the attesting witnesses are dead, beyond the reach of process, or from lapse of time are unable to recollect all the facts essential to a good execution, if their signatures and that of the testator are proved, an attestation clause showing a compliance with all the formalities required by law is prima facie evidence of the due execution of the will: *Chaffee v. Baptist Missionary Conv.*, 10 Paige, 85, 40 Am. Dec. 225; *Will of O'Hagan*, 73 Wis. 78, 9 Am. St. Rep. 763, 40 N. W.

649; *Allaire v. Allaire*, 37 N. J. L. 312; *Farley v. Farley*, ¹³⁴ 50 N. J. Eq. 434, 26 Atl. 178; *Barnes v. Barnes*, 66 Me. 286; 1 *Redfield on Wills*, 238. The evidence tends to show that the testator was accustomed to draw wills and to superintend their execution for other people before the execution of the will in question; and that he drafted his own will here sought to be established, with a perfect attestation clause thereto, and superintended its execution, with full knowledge of the requirements of law for the due execution of such an instrument. This, of itself, raises a strong presumption that the known requirements were complied with: 1 *Redfield on Wills*, 240; *In re Lapaugh's Will*, 23 N. J. Eq. 507.

With the proponents' case standing thus, it could not be taken from the jury, and to order a verdict was error.

Judgment reversed and cause remanded.

The Publication of a Will may be in any form of communication by the testator to the witnesses whereby he makes known that he intends the instrument to take effect as a will: *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235. See, too, *Schierbaum v. Schemiae*, 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526.

Witnesses to a Will need not attest it in the presence of one another: *Johnson v. Johnson*, 106 Ind. 475, 55 Am. Rep. 762; *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367. It is sufficient that they, at different times, in the presence of the testator and at his request, affix their names as subscribing witnesses: *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Eelbeck v. Granberry*, 2 Hayw. (N. C.) 232, 2 Am. Dec. 624; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280.

A Will Need not be Signed by the Testator in the presence of the attesting witnesses. It is sufficient that he acknowledges his signature and requests them to sign, or declares to them that the paper is his will: *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280. A will need not recite that the witnesses subscribed their names in the presence of the testator: *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 29 South. 98; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706, 16 Atl. 690.

Wills—Proof of.—Upon proof of the genuineness of the handwriting of the testator, and of the witnesses when dead, it will be presumed that all the requisites of the statute have been complied with, unless the contrary appears upon the face of the will: *Woodruff v. Hundley*, 127 Ala. 640, 85 Am. St. Rep. 145, 29 South. 98.

DIETRICH v. HUTCHINSON.

[73 Vt. 134, 50 Atl. 810.]

MARRIED WOMAN'S CONVEYANCE.—WHEN A HUSBAND has a freehold interest in his wife's realty by virtue of the marital relation, he must, to make her conveyance thereof good, be named in the deed as grantor. His executing the deed jointly with her is not enough. (pp. 699, 700.)

MARRIED WOMAN'S CONVEYANCE.—A WIFE'S COMMON-LAW DISABILITY in respect to conveying her interest in real estate not her separate property has not been removed in Vermont. (p. 700.)

CONVEYANCE TO MARRIED WOMAN.—FOR REAL ESTATE TO BE THE SEPARATE PROPERTY of a married woman, the deed to her must contain explicit words shutting out her husband from his marital rights therein. (p. 701.)

A MORTGAGE BY A MARRIED WOMAN of property in which her husband has a freehold interest is void, if his name does not appear therein as grantor, though he signs and acknowledges it. (pp. 698, 701.)

A MARRIED WOMAN CANNOT CHARGE HER REAL ESTATE, except in the way provided by statute. (p. 701.)

MISTAKE—RELIEF IN EQUITY.—When an instrument is drawn and executed that is intended to carry into effect a prior agreement, but by mistake of the draughtsman, either as to law or fact, it does not fulfill the intention of the parties, equity will afford relief. (p. 702.)

MISTAKE—DEVESTING TITLE FOR.—Inadvertence and mistake, equally with fraud and wrong, are grounds for judicial interference to divest a title acquired thereby. (p. 703.)

MISTAKE—RESCISSION OF CONVEYANCE FOR.—If the parties to a contract for the sale of land undertake to complete it by a deed and a mortgage back, and the mortgage, by mistake or ignorance of the draughtsman, is void, and the party in default, by conveying the property, has placed it out of her power to remedy the defect, this makes a case for rescission, if the other necessary elements exist without countervail. (p. 703.)

CONVEYANCE—NOTICE OF VOID MORTGAGE.—Although knowledge of a void mortgage is no notice to a grantee of any title thereunder in the mortgagee, yet it is notice to him of whatever right by way of remedy the mortgagee may have by reason of the mortgage being void. (p. 703.)

Bill to foreclose the equity of redemption of Lydia and Charles Hutchinson and Edward H. Deavitt in certain property. There was a decree in favor of the orator, and defendant Deavitt appealed.

Sullivan & Cleveland and E. W. Smith, for the orator.

Edward H. Deavitt, pro se.

¹³⁶ ROWELL, J. On September 28, 1896, the petitioner sold and conveyed to the defendant, Lydia Hutchinson, a

house and lot in Lyndon for one thousand dollars, two hundred dollars of which were paid down, and at the same time, and as a part of the transaction, the mortgage in question was given thereon to secure the balance, evidenced by four promissory notes of that date for two hundred dollars each, signed by Mrs. Hutchinson and her husband, Charles Hutchinson, one of the defendants, and payable to the petitioner, or order, in one, two, three, and four years from date respectively, with interest annually. Only Mrs. Hutchinson's name appears in the body of the mortgage as that of the grantor, the name of her husband not appearing therein at all as grantor nor otherwise, not being suggested even in the testatum; but he signed and acknowledged the ¹³⁷ mortgage the same as his wife did. The instrument has only one seal; but as the defendant Deavitt, who alone defends, does not claim in argument that it is not to be taken as the seal of both signers, it is so taken.

On April 14, 1899, Mrs. Hutchinson leased the place for a year, and her husband directed the lessee to pay the rent to the petitioner to apply on the mortgage, and thereupon they moved away, leaving no one to look after the place for them, and the petitioner could not ascertain their whereabouts.

On April 4, 1900, the defendant Deavitt, knowing of the mortgage, and what it was given for, took a quitclaim deed of the place from the Hutchinsons, the consideration of which was a debt of sixty-five dollars that Hutchinson owed him for money advanced and legal services rendered. Deavitt now claims that the mortgage is void, because not joined in by Hutchinson as the statute requires, and seeks to hold the property discharged therefrom.

The statute provides that a husband and wife may, by their joint deed, convey the real estate of the wife as she might do by her separate deed if unmarried (Vt. Stats. 2209); and that a married woman shall not convey nor mortgage her real estate except by deed duly executed by herself and husband: Vt. Stats. 2646. This last section, though passed long after the other, does not alter the other, for as originally passed, it had after the words "herself and husband," the words, "as now provided by law" (Acts 1884, No. 140, sec. 1); and not putting those words into the revision does not alter the construction of the section, and so the question depends upon the construction of section 2209.

There is more or less conflict in the cases as to what is a sufficient joining of a husband in his wife's deed of her real

estate to answer the requirements of the statutes in such case made and provided. But we think the weight of authority is, that when the husband has a freehold interest in his wife's real ¹³⁸ estate by virtue of the marital relation, he must, in order to make her conveyance thereof good, so join therein as to pass his title, and that to do that, he must be named in the body of the deed as a grantor, and use apt and sufficient words to convey, and that his merely executing a deed jointly with his wife in which she alone is named as grantor is not enough: 9 Am. & Eng. Ency. of Law, 2d ed., 111. This agrees with the holding in *Agricultural Bank v. Rice*, 4 How. 225, and *Batcheler v. Brereton*, 112 U. S. 396, 5 Sup. Ct. Rep. 180, that in order to convey by grant, the party possessing the right must be the grantor, and use apt and proper words to convey to the grantee, and that merely signing, sealing, and acknowledging an instrument in which another is grantor is not sufficient. Chancellor Kent says that the weight of authority would seem to favor the existence of a general rule of law that the husband must be a party to the conveyance or release of his wife, and that such a rule is founded on sound principles arising from the relations of husband and wife (2 Kent's Commentaries, 10th ed., *153); and on page *155, "on review of our American law on this subject," he concludes the general rule to be that the husband must show his concurrence in the wife's conveyance by becoming "a party to the deed," and that the cases in which her deed without such concurrence is valid are to be considered as exceptions to the general rule. An extended consideration of the cases is unnecessary. They are pretty fully reviewed in a note to *Payne v. Parker*, 25 Am. Dec. 226, in one to *King v. Rhew*, 23 Am. St. Rep. 82, and in 9 Am. & Eng. Ency. of Law, 2d ed., 110-113. Much of the conflict among them is apparent rather than real, and grows out of the difference in statutes and in the marital rights of the husband in his wife's lands. Thus, in Maine, the statute requires "the joinder of her husband," but not, it is said, as a grantor, for he has nothing to grant, but merely as an assenter, for he has only the power to give or to withhold assent; and ¹³⁹ therefore it is sufficient there if he signs and seals the deed without otherwise becoming a party to it: *Bray v. Clapp*, 80 Me. 277, 6 Am. St. Rep. 197, 13 Atl. 900. The court says in that case that why a husband, under the common-law sway, joined in the wife's deed, was, that they were both seised of her real estate—he of a freehold and she of a

fee; that they were regarded as one person, the legal existence of the wife being consolidated into that of her husband; and that therefore they were required, in matters affecting her, to join in pleading and conveyance; but that those rules, under their statutory system, are obsolete. But under our statutory system they are not obsolete as to real estate of the wife that is not her separate property, for in that the husband still has a freehold (*Hackett v. Moxley*, 68 Vt. 210, 34 Atl. 949); and in respect of conveying her interest in it, the wife's common-law disability has not been removed, but continued by statute.

In Massachusetts, where, since the statute of 1857, only the husband's "assent in writing" is required, he need not join in the deed as grantor, but his signing and sealing it is sufficient (*Chapman v. Miller*, 128 Mass. 269); or witnessing it (*Child v. Sampson*, 117 Mass. 62); or signing as grantor the mortgage notes of his wife: *Cormerais v. Wesselhoeft*, 114 Mass. 550. But before the passage of that statute, it would seem to have been otherwise there; for in *Jewett v. Davis*, 10 Allen, 68, it was held that by well-settled principles of the common law, as long held and practiced upon in that commonwealth, and subsequently confirmed by statute, a married woman who owns the fee of land not held to her sole and separate use, could convey the same only by deed executed by herself and husband, and when both were parties to the effective and operative part thereof.

In Connecticut, the statute requires the deeds of married women to be "executed by them jointly with their husbands,"¹⁴⁰ and they hold that he who signs executes, and that the husband's name need not be inserted in the body of the deed: *Pease v. Bridge*, 49 Conn. 58.

In order for the premises in question to be the separate property of Mrs. Hutchinson, the deed thereof to her must contain explicit words shutting out her husband from his marital rights in it (*Curtis v. Simpson*, 72 Vt. 235, 47 Atl. 829); and as it does not appear that it contains such words, it must be taken that he has a freehold therein, and so the mortgage is void.

Nor can it be validated in equity without statutory power therefor: *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3. But a statute passed since the mortgage was given, retroactive in terms, empowers the court of chancery, in its discretion, on the petition of anyone interested, to confirm and validate any deed of the real estate of a married woman in which her hus-

band did not join, and to order and compel the husband to execute and deliver all instruments necessary to that end: Acts of 1896, No. 49, sec. 2, amended by Acts of 1898, No. 55.

But the court of chancery has never been called upon to exercise, and never has exercised, its discretion in this behalf in this case, for the petition is not drawn so as to present the question; and this court has no discretion in the matter, for in chancery appeals it does not sit as a court of chancery, but only as a court of error. Nor can the transaction be treated as an equitable mortgage; for a married woman cannot charge her real estate not her separate property, except in the way provided by statute.

Neither can the petitioner have "the remedy of a trust capable of assignment, enforceable against a subsequent purchaser with notice," as suggested; for Mrs. Hutchinson could not while she owned the property be considered as a trustee of it for the petitioner, and therefore her grantee cannot be, though he took with notice.

¹⁴¹ These things being so, we are asked on the strength of *Chapman v. Long*, 72 Vt. 235, 47 Atl. 829, above cited, to nullify the deed to Mrs. Hutchinson, and divest the title acquired thereby, because, the mortgage being void, her part of the contract of purchase has not been fully performed. In the case relied upon, a father conveyed his property to his children, and took back a deed conditioned for his life support and for a reconveyance on payment of expenses incurred by them in performing. One of the children was a married woman, and her husband did not join in the deed, wherefore it was void as to her. The father received nothing by way of support, and the children refused to reconvey on demand. The father's deed to the children was declared void. The court said that when persons undertake to perfect an agreement by two instruments, and one of them is from ignorance so defectively executed as to be void, and the party in default refuses to remedy the defect, the other instrument should be treated in equity as void at the election of the grantor when the rights of third persons have not intervened. This was a rescission on the ground of mistake, a well-recognized remedy in equity.

It is an unquestionable principle of equity, that when an instrument is drawn and executed that was intended to carry into effect an agreement previously made, but which by mistake of the draughtsman, either as to law or fact, does not fulfill the manifest intention of the parties, equity will afford re-

lief, because the execution of agreements fairly and legally made is a peculiar branch of equity jurisdiction; and if an instrument intended to execute the agreement is for any reason insufficient for that purpose, the agreement remains as much unexecuted as though one of the parties had refused altogether to comply with it, and a court of equity will grant relief as much in one case as in the other: *Hunt v. Roumaniere*, 1 Pet. 1, ¹⁴² 13; *Walden v. Skinner*, 101 U. S. 583; 1 Story's Equity Jurisprudence, Redfield's ed., sec. 115.

This relief is granted in different ways, according to the circumstances of the case—sometimes by compelling specific performance; sometimes by rescission; and in other ways, it may be. It is said in *Williams v. United States*, 138 U. S. 517, 11 Sup. Ct. Rep. 458, that it cannot be doubted that inadvertence and mistake, equally with fraud and wrong, are grounds for judicial interference to divest a title acquired thereby.

In the case at bar, the parties to the contract undertook to complete it by two instruments, the deed and the mortgage, and the mortgage, which was drawn in New Hampshire, by mistake or ignorance of the draughtsman, was so defectively drawn as to be void, whereby the intention of the parties failed of accomplishment and the contract of completion, and Mrs. Hutchinson, the party in default, virtually refuses to remedy the defect, for she has put it out of her power to do so by conveyance to Deavitt. This makes a case for rescission, if all the other necessary elements exist without countervail, and against all the defendants; for although knowledge of the mortgage was no notice to Deavitt of any title thereunder in the petitioner, for being void it conveyed none, yet it was notice to him of whatever right by way of remedy the petitioner might have by reason of its being void: *Mining etc. Co. v. Windham County Bank*, 44 Vt. 489. But whether all the other necessary elements do exist without countervail, we cannot well say on this record nor do we say in advance what those elements are, nor what would countervail them. All this we leave for future consideration, if that becomes necessary.

The circumstances of the case are such that we do not direct a final decree against the petitioner, but leave him at liberty to apply further, if he be so advised.

Decree reversed and cause remanded.

Married Woman's Conveyance.—The assent and concurrence of a husband required by statute to give validity to a conveyance of his wife's lands can be manifested only by his joining in the alienation in such a way as would be necessary to the conveyance of his interest if the land belonged to him in severalty, or jointly, or in common with others. If such deed is signed by him, but his name appears nowhere in the body of the instrument, it is void: *Adams v. Teague*, 123 Ala. 591, 82 Am. St. Rep. 144, 26 South. 221. Compare the note to *Payne v. Parker*, 25 Am. Dec. 227, 228; *Richardson v. De Giverville*, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974; *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690, 11 S. W. 38; *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. Rep. 319, 8 S. W. 897.

Married Woman's Separate Estate.—No special or technical words are necessary to the creation of a married woman's separate estate, but the intention to exclude her husband's common-law marital rights must be clearly expressed: *Richardson v. De Giverville*, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974. Property may be so conveyed to her as to bar him of an estate by the curtesy: *Haight v. Hall*, 74 Wis. 152, 17 Am. St. Rep. 122, 42 N. W. 109; *McBreen v. McBreen*, 154 Mo. 323, 77 Am. St. Rep. 758, 55 S. W. 463; *Flournoy v. Flournoy*, 86 Cal. 286, 21 Am. St. Rep. 39, 24 Pac. 1012.

Mistake and Ignorance as grounds for relief are considered in the monographic note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 494-520. Consult, also, the recent cases of *Woodside v. Lippold*, 113 Ga. 877, 84 Am. St. Rep. 267, 39 S. E. 400; *Kowalke v. Milwaukee Electric etc. Co.*, 103 Wis. 472, 74 Am. St. Rep. 877, 79 N. W. 762. A court of equity can interfere, in cases of mistake in written instruments, only as between the original parties or those claiming under them in privity: *Adams v. Baker*, 24 Nev. 162, 77 Am. St. Rep. 799, 51 Pac. 252. See, too, *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099. Evidence sufficient to reform a deed on the ground of mistake must be clear, precise and indubitable: *Boyertown Nat. Bank v. Hartman*, 147 Pa. St. 558, 30 Am. St. Rep. 759, 23 Atl. 842; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, 34 Atl. 1099.

MARTIN v. HARRINGTON.

[73 Vt. 193, 50 Atl. 1074.]

THE HOMESTEAD ACT IS TO PROTECT THE HUSBAND as well as the wife. (p. 709.)

A HUSBAND'S SOLE DEED OF A HOMESTEAD is void, and is not rendered in any way effective by the subsequent death of his wife leaving him without family. (pp. 705, 710.)

Petition for the appointment of commissioners to set out a homestead. It stated that the defendants had obtained a decree of foreclosure of a mortgage executed by the petitioner, Edwin R. Martin, without the joinder of his wife, and covering

their homestead. The bill was dismissed on demurrer, and the orators appealed

Batchelder & Bates, for the petitioner.

Barber & Darling, for the petitionee.

¹⁹⁴ TAFT, C. J. When the mortgage in question was executed the mortgagor, a married man, was occupying the premises as a homestead. The wife did not join in the mortgage. Subsequently, having no children, the wife died, leaving the husband without family; the husband continued in the occupation of the premises as a housekeeper, with neither wife nor children, and subsequently married the petitioner, Avis A.

The only question made in this case relates to the validity of the mortgage deed upon the death of the wife. Was the deed upon the happening of that event null, or did it become of force so as to cover the homestead? This question has never been before our courts.

When the homestead act was first passed, section 5, No. 20, acts of 1849, provided that the homestead should not be alienated nor mortgaged by the owner thereof, if a married man, except by the joint deed of husband and wife, executed and acknowledged ¹⁹⁵ in the manner provided for the conveyance of the lands of married women. Under this statute it was held that the owner of a homestead, having a wife, might convey it by his own deed and pass the title thereto during his lifetime, and that the wife could not assert her rights unless she survived him: *Howe v. Adams*, 28 Vt. 541; *Jewett v. Brock*, 32 Vt. 65. In *Davis v. Andrews*, 30 Vt. 678, the same rule is stated, although the question did not arise, as the court held upon the facts that neither of the plaintiffs had any right of homestead in the premises.

After these cases were decided the legislature altered the statute by No. 36, acts of 1860, providing that if the wife did not join in the execution of the conveyance, it should "be wholly inoperative to convey any right, title, or interest in such homestead, and the rights of the parties, and of all persons claiming under them, or either of them, shall be and remain the same as if no such deed had been executed." This section, in substance, has remained in our statutes until the present time without change, except that in the Revised Laws of 1880 the word "wholly" was omitted.

Some years after the passage of this act in the case of *Day v. Adams*, 42 Vt. 510, the claim was made, with reference to

the homestead in controversy in that suit, that the wife could not assert her right until the death of her husband, but the court held that that question was not material, as the widow and children took an absolute title at the death of the husband and had not waived their homestead right, but Peck, J., referring to the claim, said: "We are by no means prepared to assent to the proposition that the sole deed of the husband in such case would be effectual to disturb the occupancy of the husband and his family while they continued to occupy the premises as a homestead." The same question arose in the case of *Abell v. Lothrop*, 47 Vt. 375. The husband, mortgagor, was living, ¹⁹⁶ and it was claimed that he was estopped by his deed from denying the title of the defendant under the mortgage, and that his deed had the effect to pass the title to the homestead during his lifetime, and that the rights of the wife and minor children to the homestead could only attach at his decease. The mortgage in that case had been foreclosed, the decree had expired without redemption, and a bill was brought in the name of the mortgagor, his wife, and children, setting up a homestead claim in the premises and asking that the homestead might be set out. The judge who wrote the opinion refers to the cases heretofore cited decided under the first homestead act, and then says: "Whatever may be said of these cases decided under the statutes then in force, we are all agreed that the statutes now in force relating to the homestead are sufficient authority for sustaining the bill in this case," and granted the relief sought. And referring to the language of the present statute, the court further said: "Surely no more explicit language could be used to negative the right of the husband to convey either his own or his family's interest in the homestead. His deed is absolutely void; he has no capacity to deed, and the title to the estate remains as if no deed was executed." This is the only case that has been called to our attention in which this question was involved.

The case of *Abell v. Lothrop*, 47 Vt. 375, follows the words of the statute, and holds that the sole deed of the homesteader shall be inoperative so far as the homestead is concerned. It decides that the husband homesteader, and his wife and children, cannot be disturbed in their occupation of the homestead during the life of the husband and father by one claiming under the sole deed of the husband and father. But that is not the question before us, and the cases cited and some noted

hereafter are referred to by way of argument and on account of the claim made that they sustain the doctrine urged by the defendants ¹⁹⁷ in support of their contention, for if the husband cannot successfully defend against the mortgagee when his wife and children are living, how can he, when they are all dead, and he is the survivor?

The validity of the sole deed of a husband is referred to in *Whiteman v. Field*, 53 Vt. 554, in which the question is discussed and a conclusion arrived at, that a deed executed when the wife was living would be operative to convey the estate, and that it would become operative when the encumbrance had been removed. In the opinion it is said: "The homestead right of the wife and minor children is inchoate, subject to be defeated by the abandonment of the same by the head of the family or the acquisition of another homestead by him And in case of the death of the wife and minor children during the lifetime of the husband and father, the estate is relieved from any homestead interest in the same." This in effect is saying that in that event the sole deed of the husband and father would become operative and the homestead pass under it. The defendants herein claim that the case of *Whiteman v. Field*, 53 Vt. 554, overrules that of *Abell v. Lothrop*, 47 Vt. 375, and that the latter case has never been cited by the court since the case of *Whiteman v. Field*, 53 Vt. 554, was decided, while the latter has been cited with approval four times.

In regard to the *Whiteman* case, it is enough to say that the question discussed and which the court assumed to decide was not before the court. The case was in equity under the early practice, and the court found upon the proofs that the defendant who claimed the homestead "never acquired any such [homestead] right in any portion of the mortgaged premises."

The court further say: "This finding is conclusive against the right of C. C. Field to homestead in the premises described in the mortgage sought to be foreclosed; but the question of the legal effect of the mortgage deed executed by C. C. ¹⁹⁸ Field upon the assumption that he then had the homestead in the premises described in it has been ably discussed by counsel, and we have thought proper to consider it." Then follows a long discussion with the conclusion above stated.

It is thus seen that the *Whiteman* case involved no legal question whatever, it turned upon a question of fact, and the

case should never have been reported, as it involved no question of law.

The cases in which *Whiteman v. Field*, 53 Vt. 554, has been cited are: (a) *Heaton v. Sawyer*, 60 Vt. 495, 15 Atl. 166, in which it is said that the *Whiteman* case decides that a "conveyance by the husband is only operative against the rights of the wife and minor children." This, we have seen, the *Whiteman* case did not decide, and in the *Heaton* case no question was made between the mortgagor and the mortgagee as to the validity of the mortgage, but the question litigated was whether a divorced wife was entitled to a homestead in the lands of her deceased husband.

(b) In *re Hatch's Estate*, 62 Vt. 300, 22 Am. St. Rep. 109, 18 Atl. 814, in which it is cited to show that the wife and children after the death of the homesteader can hold the homestead against the sole deed of the husband and father, a question upon which it was hardly necessary to cite authority, as the statute vested the title in them.

(c) In *Thorp v. Thorp*, 70 Vt. 46, 39 Atl. 245, and *Thorp v. Wilbur*, 71 Vt. 266, 44 Atl. 339, it is cited upon a question foreign to the question before us, viz., that "whether premises are so used or kept as to constitute a homestead is largely determined by the intention of the homesteader."

(d) *Whiteman v. Field*, 53 Vt. 554, is also cited in *Russ v. Henry*, 58 Vt. 388, 3 Atl. 491, that under a former statute, premises, in order to constitute a homestead, must be used or kept as a homestead.

(e) In 15 *American and English Encyclopedia of Law*, second edition, 683, note 2, it is cited as disapproving *Abell v. Lothrop*, 47 Vt. 375.

¹⁹⁹ The impropriety of discussing questions obiter is seen when we find that *Whiteman v. Field*, 53 Vt. 554, which did not settle a single legal question is constantly cited in support of questions not involved in that case, and as disapproving a case which is undoubted law.

The words of the homestead statute in effect are: "That the deed shall be inoperative so far as relates to the homestead." It is equivalent to saying that the deed is null and void and has no force; it is conceded that it has not during the life of the wife, and we see no reason why it should change upon the death of the wife and then become operative. It is not claimed by the defendant that it becomes operative under

the familiar rule, that when one conveys land with covenants of warranty of title, the title subsequently acquired by the grantor will inure to the benefit of the grantee in discharge of the grantor's covenants.

It is not claimed that this rule applies, and it cannot well apply except to a case when it appears by the covenants contained in the conveyance itself "that the parties intend to convey and receive reciprocally a certain estate": *Carbee v. Hopkins*, 41 Vt. 250, for in this case there was no intent on the part of the mortgagor to convey, and none on the part of the mortgagee to receive, any estate or interest in the homestead.

The effect of enforcing the defendants' claim in this case is to give the mortgagee the benefit of a security which he did not intend to get, and which he knew he did not receive, and which the mortgagor had no intent to part with, and which under the statute he could not part with at the time. We hold that the deed, so far as this homestead was concerned, was inoperative to convey any interest therein.

The statute protects the homestead against any attachment by a creditor, although he has no wife nor children: ²⁰⁰ *Pierce v. Kusic*, 56 Vt. 418. Considering the object of the statute that it is to preserve a home for the family, it is not unreasonable to hold that it is as much for the benefit of an aged housekeeper, a demented octogenarian, with no means of support, as it is for the benefit of a young widow, just out of her teens, who may have a competence in her own right.

The homestead act was to protect the husband as well as the wife, and this construction is not a strained one, for we can have in mind that "courts often do accommodate the provisions of a statute to cases which they were obviously intended to cover although not well suited to accomplish."

The adjudications of our sister states are generally in accord with our holding, as may be seen by consulting 15 American and English Encyclopedia of Law, 682 et seq. One main reason urged in support of the claim that the conveyance of the homestead by the sole deed of the husband becomes valid upon the death of the wife and children is the mistaken notion that the family thereby ceases to exist. The husband is a part of the family—indeed, he is generally styled the head of the family, and is entitled to as much protection as the wife,

and oftentimes needs it more; so far as a widower is concerned the effect of so holding may result, in the language of Cockrill, C. J., dissenting in an Arkansas case, in "a solace in his loneliness for their loss."

In case there are no children and the wife is in an asylum hopelessly insane, or in prison under a life sentence, the reason for retaining the homestead has ceased as effectually as if the wife was dead. In such contingencies, does the sole deed of the husband become operative? There is as much reason it should in one case as the other, still we doubt if the claim would be made in case of such insanity or imprisonment.

Waples, a late writer on the subject of Homestead and Exemption, says: "Under the general rule that the husband alone cannot sell nor encumber his dedicated homestead, all ²⁰¹ alienation of it in any form by his act, when the property itself is not liable in rem, is absolutely void, not only as to the rights of his wife, who does not join him in the deed, and as to the children to whom the law gives the protection of shelter and the comforts of a habitation, but also as to himself. His act is a nullity, and he escapes the consequences which would follow it so far as his own right and title is concerned, but for the equitable rights and interests of his family. His deed or contract is as though it was never written or designed."

Our holding is this, and it is the only question in the case, that the sole deed of the petitioner, Edwin R., was void so far as the homestead was concerned, and was not rendered in any way effective by the subsequent death of the wife.

The petitioners were entitled to a decree in accordance with the prayer of the bill.

Decree reversed and cause remanded.

The Homestead Right is not exclusively for married women, but extends to the whole family: *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019.

A Conveyance of a Homestead or a mortgage thereof is not valid unless executed by both husband and wife: *Hart v. Church*, 126 Cal. 471, 77 Am. St. Rep. 195, 58 Pac. 910; *Thompson v. New England Mortgage etc. Co.*, 110 Ala. 400, 55 Am. St. Rep. 29, 18 South. 315; *Shields v. Bush*, 189 Ill. 534, 82 Am. St. Rep. 474, 59 N. E. 962; *North American Trust Co. v. Lanier*, 78 Miss. 418, 84 Am. St. Rep. 635, 28 South. 804. And the abandonment of homestead by either does not validate a conveyance by one of them without the other's signature: *Rogers v. Day*, 115 Mich. 664, 69 Am. St. Rep. 593, 74 N. W. 190. A void mortgage of a homestead is not validated by a subsequent abandonment of the property: *Obrien v. Woeltz*, 94 Tex. 148, 86 Am. St. Rep. 829, 58 S. W. 943, 59 S. W. 535.

A Homestead is not Lost by the death or removal of some of the members of the family: *Kessler v. Draub*, 52 Tex. 575, 36 Am. Rep. 727; *White Sewing Machine Co. v. Wooster*, 66 Ark. 382, 74 Am. St. Rep. 100, 50 S. W. 1000; *Stults v. Sale*, 92 Ky. 5, 36 Am. St. Rep. 575, 17 S. W. 148; *Lyons v. Andry*, 106 La. 356, ante, p. 299, 31 South. 38.

STATE v. SLAMON.

[73 Vt. 212, 50 Atl. 1097.]

CONSTITUTIONAL LAW—SEIZURE OF PAPERS.—It is a violation of the declaration of rights respecting searches and seizures for an officer, while searching one's person under a search-warrant for stolen goods, to take from it, against the party's will, a letter written to him. (p. 711.)

EVIDENCE—PAPERS WRONGFULLY OBTAINED.—When papers are offered in evidence, the court can ordinarily take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try that question. (p. 712.)

EVIDENCE.—A PAPER TAKEN FROM ONE'S PERSON, in violation of his constitutional right of freedom from unlawful search and seizure is not admissible in evidence against him. (pp. 712, 713.)

CONSTITUTIONAL LAW.—THE SEIZURE OF A PERSON'S PRIVATE PAPERS, TO BE USED IN EVIDENCE against him, is equivalent to compelling him to be a witness against himself. (p. 713.)

Prosecution for grand larceny. There was a verdict of guilty and a judgment and sentence thereon. The respondent excepted.

Richard A. Hoar, state's attorney, for the state.

Fred B. Thomas, for the respondent.

213 TAFT, C. J. 1. An officer had a search-warrant to search the person of the respondent for stolen goods. When engaged in the search he found on the person of the respondent, and took from it, a letter written to the respondent by a person whom the latter improved as a witness, in the impeachment of whom the letter contained material testimony. Upon trial the state offered the letter in evidence and it was admitted under objection and exception. The exceptions do not state in express terms that the letter was taken from the person of the respondent against his will, but we so construe them as it is the only fair inference from the whole record.

The taking of the letter from the person of the respondent was a plain violation of the eleventh article of the Declaration of Rights, which provides "that the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure, and therefore warrants without oath or affirmation first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places or to seize any person or persons, his, her, or their property, not particularly described, are contrary to that right, and ought not to be granted." It is needless to discuss this question. We refer to the case of John Wilkes, of the North Briton, whose house was searched and his papers indiscriminately seized by virtue of a warrant issued by Lord Halifax, Secretary of State. In an action of trespass Wilkes recovered one thousand pounds against Wood, one of the ²¹⁴ parties who made the search, and four thousand pounds against Lord Halifax. Also to *Entick v. Carrington*, 19 How. St. Tr. 1029, and *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524. These cases contain the reasoning and conclusions, upon this question, of the greatest courts of the English speaking nations. It may be noted in this case that the letter in question was "not particularly described" in the warrant, and by virtue of the warrant the officer had no right to search for nor to seize it. The state's attorney claims that the question of an illegal search is not in issue, for that the objection made on trial to the admission of the letter was that it was taken at the time of his arrest from his person and against his will, and did not make the objection that it was taken by virtue of a search-warrant. The fact appearing that the letter was taken when the officer was engaged in serving the warrant, that the search was made by virtue of the warrant, and that he found the letter when he was making the search, the objection and exception are broad enough to permit the respondent to raise the question of the illegality of the search. *State v. Mathers*, 64 Vt. 101, 33 Am. St. Rep. 921, 23 Atl. 590, is cited to sustain the claim of the state. That case involved the question of a confidential communication between husband and wife, in the form of a letter which the husband had handed to a third person to give his wife, but from whom it had been taken by one who passed it to the prosecuting officer. The court held the letter properly admitted, conceding that in the hands of the wife it would have been privileged, and said: "When papers are offered in

evidence the court can take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try that question." In most instances this rule is applicable: it is generally considered immaterial how a paper passes into the possession of the one offering it in evidence; but this rule is subject to another rule which is applicable, that when a party invokes the constitutional right ²¹⁵ of freedom from unlawful search and seizure, the court will take notice of the question and determine it. *State v. Mathers*, 64 Vt. 101, 33 Am. St. Rep. 921, 23 Atl. 590, was properly ruled, for the respondent voluntarily parted with the letter, and having done that, it was immaterial how it was obtained by the prosecution. That case was in line with *State v. Center*, 35 Vt. 378, in which it was held that testimony was properly admitted that tended to show conversation between husband and wife which was overheard by the witness, the objection being made that it was privileged for the reason that the conversation was confidential. The case of *Barrett v. Fish*, 72 Vt. 18, 82 Am. St. Rep. 914, 47 Atl. 174, is cited, but the question of an unlawful search and seizure was not in that case. The court, referring to that question, said: "The question is not involved as the letters were voluntarily delivered to Howland by the agent of the oratrix." Although the court stated the general rule that it would not inquire into the question of how the party offering papers in evidence became possessed of them, as enunciated in *State v. Mathers*, 64 Vt. 101, 33 Am. St. Rep. 921, 23 Atl. 590, it is clear that the rule is subject to the limitation hereinbefore stated.

2. We also hold that the letter was inadmissible under article 10 of the Declaration of Rights, which provides: "That in all prosecutions for criminal offenses no person can be compelled to give evidence against himself," and that this ruling is correct is clearly manifest for the reasons stated in *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. Rep. 524, hereinbefore cited. While it may be true that the respondent, having improved himself as a witness, might be cross-examined in reference to any matter material upon any issue upon the trial, it did not correct the wrong theretofore done him by the seizure of the letter in violation of his constitutional rights. The seizure of a person's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and in a prosecution for a

crime is within the constitutional prohibition. ²¹⁶ One Falgarano was summoned by the state and sworn as a witness, but was not called to testify by either side, and each party commented upon the failure of the other to call upon him. If it was error to so comment it was equally so for one as for the other. The fault being at first with the respondent's counsel, the judgment should not be reversed because the state's attorney was permitted to use an argument of the same tenor as that of the respondent. Whether either argument was improper, there is no occasion, therefore, for us to decide.

Upon inspection of the record the court are of opinion that there was error in the proceedings, and the judgment and sentence of the county court is reversed and cause remanded for a new trial.

Evidence—Searches and Seizures.—When papers are offered in evidence, the court can take no notice of how they were obtained, whether legally or illegally, properly or improperly: *State v. Mathers*, 64 Vt. 101, 33 Am. St. Rep. 921, 23 Atl. 590; *Barrett v. Fish*, 72 Vt. 18, 82 Am. St. Rep. 914, 47 Atl. 174; *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193; *State v. Atkinson*, 40 S. C. 363, 42 Am. St. Rep. 877, 18 S. E. 1021. In this last case it appeared that the defendants in a prosecution for murder had not been compelled to furnish the papers introduced in evidence against them, but that such papers had been taken from their room without their knowledge and when they were not present. In *Newberry v. Carpenter*, 107 Mich. 567, 61 Am. St. Rep. 346, 65 N. W. 530, it is decided that a court has no power to direct officers to enter the private inclosure of a person and seize his property, to be held as evidence against an alleged criminal. But in *Rusher v. State*, 94 Ga. 363, 47 Am. St. Rep. 175, 21 S. E. 593, it is held that a person in custody on a criminal charge may be subjected to a personal search and examination to discover evidence of his criminality: See, further, the notes to *State v. Davis*, 32 Am St. Rep. 643-647; *Newberry v. Carpenter*, 61 Am. St. Rep. 351-357.

STATE v. CADIGAN.

[73 Vt. 245, 50 Atl. 1079.]

CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION. The Vermont statute, discriminating against the agents of firms organized under the laws of other states, refers to such firms irrespective of the residence of their members. (p. 718.)

CONSTITUTIONAL LAW.—THE EQUAL PROTECTION of the laws means the protection of equal laws. (p. 719.)

CONSTITUTIONAL LAW.—A STATUTE THAT DISCRIMINATES BETWEEN AGENTS of firms organized under the laws of the state and agents of firms organized under the laws of other

states, making the act of the latter unlawful, while the act of the former in the same circumstances would be lawful, contravenes the constitutional provisions securing to all the equal protection of the laws. (p. 720.)

Charles Tarbell, state's attorney, for the state.

Dillingham, Huse & Howland, for the respondent.

²⁴⁶ STAFFORD, J. Cadigan is informed against for acting as agent of a partnership organized under the laws of the state of New York, in selling certain municipal bonds here, without said partnership having complied with the statute of this state requiring firms organized under the laws of other states to procure a license from the inspector of finance, to file a bond with him, and to submit to his examination, before conducting such business here. The case was heard below on demurrer to the information, which was held sufficient. The decision depends upon the constitutionality of sections of chapter 175 of Vermont Statutes, entitled "Loan and Investment Companies," which may be summarized as follows:

The first section declares that every corporation organized under the laws of this state for the purpose of selling its own choses in action, or of selling, guaranteeing, or negotiating those of other persons or corporations as investments or as a business shall be under the supervision of the inspector of finance: Vt. Stats. 4132.

Then follow sections under the division title "Foreign Corporations"; but in all these, when the word "corporation" is used it is supplemented by the words "company or firm," the phrase in full being, "such corporation, company, or firm organized ²⁴⁷ under the laws of another state." No person, it is declared, shall act in this state as agent or representative of such corporation, company, or firm, or sell, offer for sale, or negotiate choses in action, owned, issued, negotiated, or guaranteed by it, unless such corporation, company, or firm has filed with the inspector of finance a bond to the state for such an amount as he requires, not more than ten thousand dollars and not less than five hundred dollars, with such sureties or security as he may approve, conditioned for the making of such returns as may be required and the payment of all taxes that may be assessed against it, and in all things to comply with the laws of this state, and has submitted itself and its financial condition to an examination by the inspector in such manner as to enable him to make a report thereof, as specified

in this chapter, "in case of like corporations in this state": Vt. Stats. 4133.

The inspector is required to notify the state's attorney of violations of this chapter, and such are made punishable by a fine of not less than fifty dollars nor more than one thousand dollars: Vt. Stats. 4134.

When it appears to the inspector that such corporation, company, or firm is conducting its affairs in a safe and authorized manner, and has filed the required bond, he shall issue to it a license good until the first day of the next January; and within thirty days of the date of its license it shall file in his office its certificate stating the names and addresses of all who are to act as its agents in this state, which certificate shall be amended by it in case of any change: Vt. Stats. 4135.

Before it can do business here it must make the inspector its attorney upon whom process may be served: Vt. Stats. 4136.

It shall file semi-annual reports under penalty of having its license revoked: Vt. Stats. 4138.

²⁴⁸ If it conducts its business in an unsafe or unauthorized manner the inspector shall direct it to desist, and to at once provide for the safety and security of all such business transactions: Vt. Stats. 4139.

If it fails to comply with such order or to report when requested, or if it appears to the inspector that it is unsafe or inexpedient for it to continue business, he shall revoke its license: Vt. Stats. 4139.

All services and expenses under this chapter shall be approved by the state auditor and paid by the licensees upon an equitable apportionment to be made by the inspector: Vt. Stats. 4142.

The respondent, by demurring, admits that he did the thing prohibited by the statute—for no question is raised as to the form or sufficiency of the information except as hereinafter stated—but he says it was no offense, because he was acting as agent for citizens of New York, who, as such, were entitled to all the privileges and immunities of citizens of Vermont; that citizens of Vermont might lawfully do by themselves or agent all that he did in behalf of his principals; consequently it was lawful for him to do the same. The statute is thus challenged as in contravention of the United States constitution, article 4, section 2: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It is not claimed that the citizenship of the re-

spondent is of any materiality under the statute, but that the citizenship of his principals is material; that the statute is aimed at firms whose members are residents of other states; and that it requires of such firms what it does not require of resident firms.

It will be observed that the statute itself says nothing about citizenship or residence. The test is, whether the firm was "organized under the laws of another state." It is alleged that the respondent's firm was organized under the laws of ²⁴⁹ New York; but its members may all be citizens of Vermont. On the other hand, if a firm is organized under the laws of Vermont, it is exempt from these requirements even though all of its members resided in New York. So, looking at the letter only, there is no distinction between citizens of Vermont and citizens of other states. But the respondent, while taking note of this literal reading, says that the law should be tested by its intent and effect, both of which, he thinks, show clearly that it does discriminate against nonresidents. In the first place, he says, the mere fact that a common-law partnership—and the respondent's firm is not alleged to be anything more—was organized in some other state instead of in Vermont, could afford no rational basis for a distinction. It would be no protection for citizens of this state that citizens of other states came here, upon our soil, merely to make their contract of partnership, and then returned to their own states. Nor would the people of Vermont be deprived of any protection by the fact that residents of this state, doing business here, had entered into their partnership under the laws of New York. So, he says, we must look deeper to find the real intent, and that it is made plain by three special provisions of the chapter itself: 1. The requirement that a bond shall be given to secure the payment of taxes, indicating that the members are not within reach like residents; 2. The requirement that such firms make report as required of "like corporations in this state"; and 3. The condition that they appoint the inspector of finance their attorney, upon whom process may be served, a thing unnecessary in the case of residents. Moreover, it is said, while there might be such cases as those just now supposed—citizens of Vermont organizing firms in some other state, and vice versa—they would be very exceptional, and in the great majority of instances firms organized under the laws of Vermont would be composed of residents of Vermont, while firms organized

²⁵⁰ under the laws of other states would be composed of residents of such other states. There is some force in these contentions, and, indeed, it is freely conceded by the state's attorney that the act was intended to and does operate against nonresidents, really discriminating against firms whose members are not residents of Vermont, and such discrimination is defended as a fair exercise of the police power.

Thus, we see, the respondent treats the statute as discriminating against nonresidents in order to find a basis for his contention that it contravenes the federal constitution in the respect referred to; and the state treats it as discriminating against nonresidents in order to find a basis for its contention that it is a police regulation for the protection of the people of Vermont against strangers. But we are unable to adopt this construction. The statute itself takes no account of residence. In the very case before us the respondent's principals may be residents of Vermont. The respondent's neighbor, engaged in the same business, may be acting for a firm organized under the laws of this state, every one of whose members may be a resident and citizen of some other state. The test of the respondent's action is whether his principals formed their partnership under the laws of Vermont. If they did, his act was lawful; if they did not, it was unlawful. To the argument that the legislature intended to exclude firms whose members were nonresidents, it is a sufficient answer that if that is what the legislature meant that is what the legislature should have said.

The question then arises, whether the test laid down is a valid one. Does the bare fact that the partnership was formed under the laws of this state, rather than of some other, afford a rational basis for distinction in determining the lawfulness of its agent's act in doing business for it here? Is the fact that it is organized here any protection to the people of this state? ²⁵¹ Does the fact that it was organized elsewhere lessen their protection? It is difficult to see how. The laws of Vermont make no requirement of firms organized here to transact this kind of business. The provisions upon that subject relate only to corporations. The agent of a firm organized under the laws of Vermont might lawfully do all that the respondent did. The agent of individuals residing in Vermont or anywhere else might lawfully do all that he did. But if such individuals had agreed to act as partners instead of separately, and made that contract in some other jurisdic-

tion, their agent could not act for them here without committing a crime. The formation of the partnership would not relieve them from individual liability to creditors, nor make the firm a distinct legal entity like a corporation, yet it would make it a crime for the agent to do for them jointly what he might lawfully have done for them severally.

How can it be held, either that the statute is invalid as denying to nonresidents the privilege accorded to residents, as the respondent claims, or that it is valid as a police regulation against nonresidents for the protection of the people of Vermont, as the state claims, when, for anything that is alleged in this information, or anything that need be alleged or proved under the statute, all the parties concerned may be residents of Vermont? But suppose them to be resident here, can Vermont thus discriminate between her own people, denying to a class the privilege of transacting business upon such a ground as this? Not if the ground of classification is purely arbitrary and irrational. No state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws": U. S. Const., 14th amend., sec. 1. To deprive one of the right to labor and transact business is to deprive him of his liberty, and also of his property. To hedge the privilege about ²⁵² with conditions and exactions for one class which do not exist for others is to deny to the former the equal protection of the laws; and when the classification is based upon a distinction wholly fanciful or arbitrary, having no possible reasonable connection with any proper purpose to be served by the enactment, it is unconstitutional and void. The equal protection of the laws means "the protection of equal laws": *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 6 Sup. Ct. Rep. 1070.

Our own bill of rights in its first article declares, "that all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety"; and in its fourth article, that "every person within this state ought to find a certain remedy, by having recourse to the law, for all injuries or wrongs which he may receive in his person, property, or character . . . conformably to the laws"; and in its seventh article, that the "government is, or ought to be, instituted for the common

benefit, protection, and security of the people . . . and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community." These are the fundamental principles, not of our state only, but of Anglo-Saxon government itself, enlarging upon the axiom that when the facts are the same the law is the same, and inspired by the ideal of justice, that the law is no respecter of persons.

The law touching classification for purposes of taxation and what may furnish a reasonable basis therefor was carefully examined by this court in *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973, and the rule there recognized, which is none the less applicable here, will be found to determine the question before us.

²⁵³ The result is, that chapter 175 of Vermont Statutes discriminates between agents of firms organized under the laws of this state, and agents of firms organized under the laws of other states, making the act of the latter unlawful, while the act of the former in the same circumstances would be lawful, and therein contravenes the first clause of the fourteenth amendment of the federal constitution, as well as various provisions of our own bill of rights, securing to all the equal protection of the laws, and must, therefore, be held to that extent unconstitutional and void.

Judgment reversed; demurrer sustained; information adjudged insufficient and quashed; the respondent discharged and let go without day.

Constitutional Law.—The federal constitution, providing that no state shall deny to any person within its jurisdiction the equal protection of the laws, secures to every person within the jurisdiction of the state, whether a citizen or resident or not, the protection of its laws equally with its own citizens: *Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789, 54 Pac. 1011. See, further, *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165; monographic note to *State v. Goodwill*, 25 Am. St. Rep. 870-890, on the fourteenth amendment. However, a state may make it a crime for agents of foreign insurers, who have not complied with its laws, to solicit or act therein in regard to foreign insurance: See the monographic note to *Booth v. People*, 78 Am. St. Rep. 250.

STEARNS v. CITY OF BARRE.

[73 Vt. 281, 50 Atl. 1086.]

THE RIGHT OF EMINENT DOMAIN is an attribute of sovereignty existing independently of the constitution, but this does not take a provision incorporating the doctrine of eminent domain in the constitution out of the rules pertaining to constitutional construction and enforcement. (p. 728.)

EMINENT DOMAIN.—THE NECESSITY OF THE TAKING under the power of eminent domain is ultimately a judicial, and not a legislative question. (pp. 728, 733.)

EMINENT DOMAIN.—THE ASCERTAINMENT OF THE NECESSITY of taking property under the power of eminent domain should precede or accompany the taking. A rule that permits land to be taken without proof of the right to do so, and casts upon the owner the burden of instituting proceedings to save his property, does not meet the spirit of the constitutional requirement. (p. 731.)

THE CONSTITUTION GUARANTEES THE PROTECTION OF A RIGHT rather than the redress of a wrong. (p. 731.)

EMINENT DOMAIN—AMOUNT OF TAKING—PROCEDURE.—A statute that leaves undetermined the amount of the taking under the power of eminent domain must provide for the determination a procedure that accords with the established principles of law. (p. 731.)

EMINENT DOMAIN—EXTENT OF TAKING.—A STATUTE authorizing a city to condemn property to provide for a water supply, which leaves the extent of the taking to the final determination of the officers of the municipality making the condemnation, is unconstitutional. (pp. 722, 733.)

Petition by Annie Stearns and others setting out that the defendant had condemned and appropriated their property for the purpose of a water supply. The defendant filed a motion to dismiss the petition so far as it related to the taking and condemnation. The motion was overruled, and the defendant excepted.

R. M. Harvey and Frank J. Martin, for the petitioners.

J. W. Gordon, S. H. Jackson, W. E. Barney, and George W. Wing, for the defendant.

282 MUNSON, J. The petition states that the petitioners are dissatisfied with the condemnation and appropriation of their property by the petitionee, and with the amount of compensation allowed, and prays for the appointment of commissioners to inquire as to the necessity, manner, and right of such taking, and the damages caused thereby. The petitionee moves to dismiss so much of the petition as relates to the

taking, on the ground that the determination of that matter by the city council is final. The petitioners insist that the provision authorizing the condemnation entitles them to the same appeal that is allowed from the decisions of selectmen in highway proceedings, and that unless the provision can be construed to authorize an appeal it must be held to be unconstitutional.

Subdivision 14, section 55, No. 165, Acts of 1894, as amended by section 3, No. 145, Acts of 1896, authorizes the city council to provide a supply of water for protection against fire and for ²⁸³ sanitary, domestic, and other purposes, and provides that upon making compensation therefor it may take and condemn the lands, water, water privileges, rights and property of any person, company, or corporation within the counties of Washington and Orange, except such as may have been acquired by other municipal corporations before the passage of the act, and contains the following provisions regarding procedure and appeal:

"In taking such lands, water, water privileges, rights, and property for such purposes, said city council shall proceed in the same manner as selectmen of towns are authorized by law to proceed in taking lands for highways; and the same right to appeal to the county court from the decision of the city council in the awarding of damages for the taking of such lands, water, water privileges, rights, and property shall be allowed; and such appeal shall be taken in the same manner as is provided by law for appeals from the decision of selectmen in matters of highways; except that such appeal shall not prevent the said city from proceeding with its works as though no such appeal had been taken."

The clause which provides for proceedings like those had in highway cases applies only to the taking. The clause granting an appeal restricts it to the decision awarding damages. The intention to do this is indicated by the further provision that the work shall proceed as though no appeal had been taken. So it becomes necessary to pass upon the petitioners' claim that the provision leaving the question of necessity to the determination of the officials of the municipality taking the property without allowing an appeal renders the act unconstitutional.

The petitionee insists that it was clearly within the power of the legislature to leave this matter to the final determination of its city council. It is said that the action of the legis-

lature ²⁸⁴ in exercising the right of eminent domain is conclusive upon the courts as regards the question of necessity; that instead of exercising this right directly, the legislature may grant authority to exercise it to any corporation or individual, and that the grantee of this authority may determine whether it shall be exercised, and when and to what extent; that inasmuch as the property is taken for the public use, and the owner assured of a just compensation, the interest the grantee may have in the taking is of no consequence; that the owner has no constitutional right to be heard upon the question of necessity, and that its reference to a judicial tribunal is a matter of favor, and not of right. Various textbooks on the law of eminent domain, and the decisions of many states, are cited in support of these propositions. It will be well, however, to make some examination of the cases before conceding the entire soundness of these views, at least in their application to the question as presented by this act.

The subject has not been extensively treated in our own cases, but in a matter of this nature and importance the slightest references should receive careful attention. In *Hatch v. Vermont Cent. R. R. Co.*, 25 Vt. 49 (61), the defendant's charter gave it the right to determine the location of its road, subject only to very general restrictions; and in discussing the questions directly in issue, Judge Redfield remarked that, if the plaintiff desired to question the propriety of the location, it "should have been done by mandamus or injunction or some proper process to arrest and correct the evil, at the time of its being built." In *Hill v. Western Vermont R. R. Co.*, 32 Vt. 68, the charter of the company authorized it to take such lands as were necessary for the construction of its road and requisite accommodations, and the company surveyed certain land for depot grounds at Manchester. The referee found that a part of the land so surveyed was never necessary to the company ²⁸⁵ for railroad purposes, and would not become so prospectively. The court held that under its charter the company could not acquire any more land, nor any greater estate therein, for the purpose of a roadbed or stations than was really requisite for such uses; but that the directors could lay out their road and stations as they saw fit, and that as long as they acted in good faith, and not recklessly, their decision as to the quantity of land required for depot accommodations would be regarded as conclusive. In the opinion Judge Redfield says that the right to exercise the power of eminent do-

main is made dependent upon rendering an equivalent in money, "and the implied compact not to acquire more land than they need"; and again, "unless they act rashly or in bad faith it is not very obvious how they are to be controlled in the matter. No doubt if they act recklessly or extravagantly so as to indicate either utter incompetence, or corruption, or undue influence, or bad faith, a court of equity, at the suit of the land owner or the stockholders, would set the matter right." In *Eldridge v. Smith*, 34 Vt. 484, it was said that when land is taken for legitimate railroad use, the judgment of the locating officers is conclusive as to the quantity required for that purpose, unless the quantity taken is "clearly beyond any just necessity." In *Williams v. School Dist.*, 33 Vt. 271, Judge Poland says that it rests wholly with the legislature to say whether sufficient necessity exists to justify the granting of the power, and that courts will not interfere with its discretion, "at least, not unless the entire absence of any necessity be shown." In *Foster v. Stafford Nat. Bank*, 57 Vt. 128, where the statute in question was held unconstitutional because of the failure to make adequate provision for compensation, the court treated the want of necessity and the failure to provide for compensation as of the same effect, saying that the constitution limits the right to take private property to cases where necessity requires it for ²⁸⁶ a public use and where just compensation is made, and that any legislative act authorizing such an appropriation when such a necessity does not exist, or which does not provide for compensation is plainly in conflict with the constitution.

The treatment of this subject by the courts of other states will sufficiently appear from a brief review of some of their cases. In *Ex parte Manhattan Co.*, 22 Wend. 653, upon an application for the appointment of commissioners to value certain land taken by the company, it was alleged that the land was not needed for any purpose contemplated by the charter, but the court said the legislature seemed to have invested the company with a discretion nearly, if not quite, absolute; at any rate, to have made them so far the judges of the matter that the court could not arrest them on the pending application; perhaps in no way except by a direct proceeding for an abuse of their powers. In *Cotton v. Mississippi etc. Boom Co.*, 22 Minn. 372, the court found it unnecessary to decide whether the legislature could have authorized the defendant to determine the question of necessity conclusively,

but held that it could authorize the defendant to make a determination of it that would be prima facie good and binding, and that it had done this, at least, by authorizing the defendant to designate the lands necessary to be taken. In *Matter of Albany Street*, 11 Wend. 149, 25 Am. Dec. 618, which was a proceeding in connection with the opening of a street, it was objected that the extension through the churchyard was not a public necessity, and the court said that question was not before it—that if it had the power to review the decision of the corporation in that particular, it could not do so upon the pending motion. In *North Missouri R. R. Co. v. Gott*, 25 Mo. 540, the charter gave the company a right to hold a strip of land the whole length of the road, not exceeding one hundred feet in width, and provided that in passing hills or valleys it might extend said width in order to effect ²⁸⁷ said object. The petition alleged that the survey at the place in question passed hills and valleys, and that a strip one hundred and fifty feet in width was necessary for the construction of the road. The court held that this allegation was not traversable, saying that it was doubtless based upon the report of the engineer, whose judgment therein controlled the plaintiff. In *South Carolina R. R. Co. v. Blake*, 9 Rich. 228, the company was authorized to take at valuation whatever lands might be required for the purposes specified, and its claim under this provision is stated by the court as follows: "The company says that it must judge, that no other person can know its schemes and wants, that the land owners' rights are made safe by the provisions for compensation." In commenting upon this claim, the court says that if the mere assertion of the company that a parcel is required for some of the specified uses were to be held conclusive, land might be taken for other uses, and "no action of trespass would lie, for the taking would be lawful; no prohibition to restrain either the company or the commissioners would lie, for both would be acting within the bounds of delegated power"; and no "injunction could rightly arrest the regular exercise of lawful discretion." The court concluded that if the company's assertion of right was not conclusive, there must be some trial, that the complication of the matter should not suffice to withdraw it from all investigation, and that the application of the company should set forth the particular purpose for which the land was needed; but said further that the mode of trial was not then under consideration. In *Baltimore etc. R. R. Co. v. Pittsburg etc.*

R. R. Co., 17 W. Va. 812, it is said that private property can be taken only for a public use, and that no more of such property can be taken than is necessary for such use, and that this must be determined from the statute and the facts presented; ²⁸⁸ that at whatever stage of the proceedings the land owner is summoned to appear he has a right to resist the appropriation of his property, and that when it clearly appears that the property taken, or a part thereof, is not necessary for the public use, as to so much the taking is unlawful.

It will be noticed that in most of the cases above cited the legislative act did not determine the amount to be taken. The language of the following cases will sufficiently indicate the ground upon which some courts accord the land owner a judicial inquiry under statutes of this character. In *Clark v. Worcester*, 125 Mass. 226, the question was whether the fee or an easement was taken, and the court said, "the authority given to the city was to take and appropriate so much of the petitioner's estate as should be adjudged necessary to carry out the purposes of the act. The legislature did not undertake to define more particularly the nature of the estate required to be taken, or the quantity of the land to be used. The right to take is limited by the public exigency stated; beyond that the power to exercise the right of eminent domain is not given." In *Milwaukee etc. R. R. Co. v. Fairbault*, 23 Minn. 167, it was claimed by the defendant that the city council was the sole and exclusive judge as to the public necessity and propriety of laying out the proposed street, on the ground that the existence of the necessity was a legislative, and not a judicial, question; and the court said: "This is undoubtedly a correct rule as applied to the legislature itself, and also to a municipal body when acting within the conceded limits of its delegated powers. But when, as in this case, the jurisdiction of the inferior tribunal over the particular subject matter depends, not upon an express grant of power, but upon the existence of an alleged necessity from which the disputed power is to be implied, the decision of such tribunal upon the existence of the necessity is neither final nor conclusive upon the courts."

²⁸⁹ The right to an inquiry as to the necessity is often denied when the general principles conceded in the discussion would seem to require a different conclusion. In *Lynch v. Forbes*, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437, it was said that neither the state nor its delegates could take

property under the guise of eminent domain for a purpose clearly in excess of or at variance with the powers granted; but the court nevertheless held that the land owner could not stand upon the ground that the municipality had already acquired all the land necessary for its waterworks. The apparent inconsistency of these positions is pointed out by the writer of the note in 42 Am. St. Rep. 406. This writer states and considers the following question: "Conceding the public use to have been properly declared, and the propriety of some exercise of the power of eminent domain in its behalf to be admitted, is the corporation or other body to which the legislature has delegated the right to exercise this power the sole judge of the extent of the property to be acquired, and may this body or corporation proceed to acquire property irrespective of the limits thereof; or may the person whose property is about to be taken answer that such property, or some part thereof need not be taken, and that the purposes of the public use may fully be subserved without interfering with his property?" The writer concludes that under statutes which merely confer authority to take for the public use the lands necessary therefor, the courts generally regard the allegation of a necessity for the taking as an issuable one, which it is not competent for the party seeking the condemnation to determine, and permit the person whose property is to be taken to litigate the question, and defeat the proposed appropriation so far as it appears to be unnecessary. Mr. Lewis, in his work on Eminent Domain, says that under general grants of power which expressly or by implication limit the right to so much property as ²⁰⁰ may be necessary for the proposed purpose, the necessity of taking particular property is a question for the courts. It is true that many of the cases cited in support of this proposition were under statutes which expressly committed the question to the courts, and are therefore not authority for the statement; but the proposition is not without the support of well-considered cases, and is at least entitled to careful examination.

The cases already referred to suggest some inquiries that may be helpful in this further investigation. In *Matter of Albany Street*, 11 Wend. 149, 25 Am. Dec. 618, the statute authorized the opening of streets by the city government, and provided that when a part of a lot was required for this purpose the commissioners of estimate might include the whole lot in their assessment, and that the whole should thereupon

vest in the corporation. The court said this was an attempt to confer power upon the commissioners to take more land than was necessary and could not be sustained. But according to the doctrine claimed, if the statute had simply left it to the city officials to take as much land as was necessary, they could have taken the whole lot, and the land owner could not have been heard to question their right. In *Elldridge v. Smith*, 34 Vt. 484, where land was acquired for station grounds at Northfield, it was held that land might properly be taken for use in piling wood and lumber, but not to afford room for a car factory or for dwellings to rent to employés. But if there can be no inquiry as to the purposes and necessities of the company, how can the land owner ascertain the particular use for which the property is taken and restrict the taking to the legitimate need? It is said by Mr. Cooley that "the moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain"; and again, "the right, being based on necessity, cannot be broader than the necessity which supports it." But of what avail is this doctrine to the land ²⁹¹ owner if the taking is a conclusive determination of the existence and extent of the necessity?

In considering this question, the effect of incorporating the doctrine of eminent domain in the constitution must not be overlooked. It is doubtless true that the right of eminent domain is an attribute of sovereignty, and existed before the adoption of the constitution, and would continue to exist independently of it if not mentioned in it. But this does not take the provision, as embodied in the constitution, out of the ordinary rules pertaining to constitutional construction and enforcement. When so embodied its limitations become a matter of constitutional guaranty; and wherever there is a constitutional guaranty there is a call for the supervision of the courts. Our constitution in effect declares that private property can be taken by the public only when it is necessary for its use. Of what avail is this constitutional guaranty if there can be no judicial inquiry as to the necessity? The very existence of the provision makes the question of necessity ultimately a judicial one. If it does not, the legislature remains supreme in this regard notwithstanding the constitution. It is doubtless true that the people cannot divest themselves of this attribute of their sovereignty; but the constitutional provision is not an abandonment of the

right, but a regulation of the manner of its exercise. It gives to the judicial branch of the government a measure of power that would otherwise belong to the legislative branch. It says in effect that the courts shall see to it that property is not taken unless a necessity for its taking exists. If a legislative determination of the question of necessity would be conclusive in the absence of the constitutional provision, that provision, if it is to have any effect whatever, must deprive the legislative determination of its conclusive character. The statement in *Foster v. Stafford Nat. Bank*, 57 Vt. 128, that any legislative act authorizing ²⁹² an appropriation of private property where the necessity does not exist is plainly in conflict with the constitution, is apparently a recognition of this view, for how can the question of conflict with the constitution arise if there can be no inquiry as to the necessity?

It is evident from the cases before considered that many courts shrink from saying that the property owner can never be entitled to a hearing on the question of necessity, and yet find it difficult, upon the theories they have adopted, to say when and how such a hearing will be accorded him. It will aid us in dealing with this real or supposed difficulty to treat these enactments as divided into two classes. In one, the legislature authorizes the taking of certain specific property, or some property of a specified amount; in the other, it authorizes the taking of as much property as may be necessary for the purposes named. In the first, the legislature itself determines the amount of property to be taken; in the second, it leaves the amount to be determined by further proceedings. We apprehend that the difficulties suggested will be found to exist only in cases arising under statutes of the first class. Under statutes of the second class, the necessity is to be determined in some manner therein provided. If there is any infirmity here, it lies in the statute itself, and is apparent upon its face. It is only with the question as thus presented that we have to deal now.

The act under consideration authorizes the city to condemn property to provide a supply of water for the municipal purposes named. The meaning is of course that the city may take as much property as may be necessary for those purposes. The extent of the grant depends upon the extent of the necessity. If it takes more than is necessary, it is outside the power conferred. But if the theory contended for

is correct it can never get beyond its grant, for the act of taking determines ²⁹³ the necessity, and the necessity is the measure of the grant. Upon this reasoning we have a grant which can be indefinitely extended by the act of the grantee, and thus be made to legalize beyond the possibility of judicial inquiry a taking which it is not within the power of the legislature to authorize. It would seem from these considerations that the mere act of taking under a general authority of this character cannot conclude the rights of the owner.

The petitionee concedes that the land owner will be entitled to the aid of courts if the taking is tainted by fraud. This, of course, is not a hearing upon the question of necessity, and is not claimed to be. The fact remains that under the proposed rule the owner may be deprived of land not needed for the public use, and be without remedy. To place the owner in this predicament it is only necessary for the corporation taking the property to be sufficiently moderate to escape the charge of bad faith. Between the limit called for by necessity and the limit determined in bad faith there lies a considerable territory as to which the law has had little to say. Within this range the land owner is left without other protection than the discretion of the taker.

The theory seems to be that the legislature can take as much property as it judges to be necessary for the public use, and can therefore delegate to any applicant the right to take as much as he may consider necessary for that use. This involves not only an exercise of legislative discretion by delegated authority, but an exercise of it by a party who is to be benefited thereby. It is said, however, that the interest of the party who is to exercise the right is of no consequence, because the taking is for the public use and must be limited to the public necessity. But the taking is not limited to the public necessity by any other standard than the judgment of this interested taker. In this case the condemnation is by the ²⁹⁴ officials of the municipality for whose use the property is taken. It is said that whatever question can be made as to the propriety of delegating this power to private corporations or individuals, there is no basis for a doubt as to its propriety in the case of municipal corporations, these being but local branches of the government. But a municipality has the same interest to extend the taking beyond the necessity that a private corporation or individual

would have. It is entitled to acquire enough to provide for the contingencies of fire, and for the future wants of an increasing population; and in the meantime it can properly devote what is not required for existing public uses to uses that are not public. If it can secure under the guise of providing for these uncertain but legitimate necessities more than the law contemplates, it will swell the surplus available for the supply of private needs, and thus increase illegitimately the profits available for the payment of its general expenses. And this advantage can accrue to the municipality without any exercise of bad faith or tangible violation of law. Between the rights of the land owner and this appropriation and use of his property there stands only the judgment of officials interested to provide for the municipal expenses otherwise than by taxation, and ready to believe that the most ample provision will be justified by the growth of their town.

There is, however, a growing disposition to assert that the rule which limits the taking to the necessity is something more than a theory; that the taking of the party making an appropriation under an indefinite grant is not conclusive upon the courts; and that if more be taken than is needed for the public use the aggrieved owner will be entitled to some proceeding to re-establish the bounds of his invaded right. But we think a remedy of this character comes short of the protection to which the owner is entitled. The constitution ²⁹⁵ gives him something more than the right to recover his property from a summary seizure under an indefinite grant. His property is not to be taken unless necessary for the public use. The existence of that necessity is the foundation of the right to take, and its ascertainment should precede or accompany, and not follow, the taking. We are not satisfied with a rule which permits the taking of land without proof of the right to do so, and casts upon the owner the burden of instituting proceedings to save his property. This imposes upon the owner the necessity of furnishing bail for repeated suits in trespass or bonds for the payment of injunction damages, and these are burdens and risks which in some cases might easily deter a prudent man from any attempt to assert his claim. Remedies of this nature do not meet the spirit of the requirement. The constitution guarantees the protection of a right rather than the redress of a wrong.

We think an act which leaves the amount of the taking undetermined must provide for the determination a procedure which

accords with the established principles of the law. Mr. Lewis says, in section 365 of the work already referred to, that the view entertained by some courts that the requirement of due process of law is not applicable to an exercise of the right of eminent domain is wholly without foundation. He says further that all authorities are agreed that due process of law requires notice and an opportunity to be heard before an impartial tribunal. A reference to the views taken in regard to the failure to provide for notice will throw some light upon the question we are considering. In many statutes of this character there is no provision for notice, and yet a statute has seldom been held invalid on this account. The courts have generally conceded the necessity of notice, but have implied a requirement of notice from other provisions of the statute. The difficulties attending this course were pointed out by the Illinois ²⁹⁶ court in *Johnson v. Joliet etc. R. R. Co.*, 23 Ill. 202; and Mr. Lewis concludes his consideration of the question and review of this case by saying that the only logical conclusion is that a statute which does not provide for notice is invalid. Some courts which entertain upon the question of necessity the views herein expressed have found a right of appeal under some general provision, or have in some way implied an intention to grant one. We can find no justification for the first course in any provision of our general law, and we are clearly precluded from the second by the fact that the right of appeal was at first expressly given and then taken away by amendment. In these circumstances the conclusions we have heretofore reached require that this part of the act be held invalid.

We have not arrived at this result without giving careful attention to the course of legislation in this state. It is said that the unquestioned acceptance for so long a period of our many enactments which provide for a taking by the interested party without an appeal being permitted makes strongly in favor of the constitutionality of this method. We are reminded that prior to the revision of 1839 there was no appeal from the decision of the selectmen in laying out highways. It is equally true that during most or all of that time there was no provision regarding a finding of necessity or convenience. The early statute simply authorized the selectmen to lay out such highways as they judged proper. In view of the general frame of the law, no argument in favor of the constitutionality of this act can well be drawn from

it. For the last sixty years the statute has allowed an appeal from these decisions of the selectmen, and we are not aware that the interests of the state have suffered from the change. Under some, at least, of our railroad charters there was no appeal from the action of the company in taking as much land as it chose for its roadbed and stations, and we have seen the manner in which our court has referred ²⁹⁷ to the problems presented by a taking under an indefinite grant of this character. Most of the acts incorporating companies for supplying villages with water gave the right of eminent domain only for the transfer of the water, and in many cases where an appropriation of the water was authorized provision for an appeal was made. The charter of the appellee as originally passed in 1894 contained a provision of this character, but this was stricken out by the amendment of 1896.

Nor have we overlooked the objections of a more general character. It is said that great public improvements essential to the welfare of the state cannot be carried on, if the taking of private property is hampered by any judicial inquiry as to the necessity. If this refers to the fact that a judicial tribunal will be less likely than the municipality to condemn all that is desired, the previous discussion must suggest a sufficient answer. If it refers to matters of procedure, it is only necessary to say that provision can be made for the appointment, the hearing and the decision, irrespective of the stated terms of court. It is said that the public necessity will not permit the delay incident to an appeal. But there need be no appeal if the statute provides a suitable tribunal for the taking in the first instance. No jury trial is required in such cases, and the several instances of taking can be finally disposed of by one disinterested commission. This course in no way clashes with the doctrine that the sovereign must always be the judge of the necessity. The sovereign remains the judge of the necessity, but ultimately determines it through the judicial branch of its government instead of the legislative branch. It is the constitutional provision which represents the sovereign will—not the legislature nor the judiciary. Nor will this prevent the making of a liberal provision for the legitimate needs of the municipality, both present and prospective. But this liberal provision ²⁹⁸ will be made by a judicial tribunal under the rules of law as administered by established courts.

We hold this provision invalid, for that it leaves the extent of the taking to the final determination of the officers of the municipality making the condemnation.

Appeal dismissed.

Start, J., dissents.

Eminent Domain.—The necessity of the taking under the power of eminent domain is generally considered a question ultimately to be determined by the judiciary: Note to *Lynch v. Forbes*, 42 Am. St. Rep. 408. For authority to the contrary, see *Lynch v. Forbes*, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437; and consult, also, *Wulzen v. Board of Supervisors*, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353; *Paxton etc. Co. v. Farmers' etc. Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343. It also lies with the courts ultimately to determine whether the use to which the property is to be devoted is a public use: *Fanning v. Gilliland*, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1003. Proceedings in the exercise of the right of eminent domain, and the damages therefor, are considered in the monographic notes to *Gainsville etc. Ry. Co. v. Hall*, 22 Am. St. Rep. 48-52; *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 610-615; *Sheehy v. Kansas City etc. Ry. Co.*, 4 Am. St. Rep. 399-405.

TARBELL v. RUTLAND RAILROAD COMPANY.

[73 Vt. 347, 51 Atl. 6.]

A CONTRACT REPROBATED BY PUBLIC POLICY is illegal, though in that particular instance no actual injury has resulted to the public. (p. 735.)

A CONTRACT EXEMPTING A RAILROAD COMPANY FROM ITS STATUTORY LIABILITY for negligence, made between it and the next of kin of its employé, is against public policy and invalid. (pp. 734, 735.)

COURTS WILL NOT ENFORCE CONTRACTS MADE FOR THE PURPOSE OF VIOLATING STATUTES, but will hold them inoperative and void. (p. 735.)

Butler & Maloney, for the plaintiff.

F. H. Button and Barber & Darling, for the defendant.

348 TYLER, J. Action, case, for defendant's negligence, through its servants and agents, in leaving, or permitting to be left, a car loaded with lumber to stand upon a sidetrack in such proximity to the main track that the plaintiff's intestate, while descending a ladder on the outside of one of the cars which the defendant was operating on the main track, was struck, knocked from the car, and so injured that he died.

The question before us is raised by the plaintiff's demurrer to the defendant's pleas, wherein it is alleged that the

plaintiff, as next of kin of the intestate, Arthur W. Tarbell, before the latter's employment by the defendant and in consideration that it would employ him, entered into a written agreement with the defendant by which the plaintiff released and discharged it from all damages that might accrue to the plaintiff, as next of kin of the intestate, by reason of the defendant's negligence during his employment.

The defendant contends that, though such a contract between itself and the injured employé might not be upheld, ³⁴⁹ this contract, being with the next of kin of the employé, does not contravene public policy.

The general rule of law is stated to be that whatever tends to injustice or oppression, restraint of liberty, and natural or legal right, or to the obstruction of justice, or to the violation of a statute, and whatever is against good morals, when made the subject of a contract, is against public policy and void. It is said that they are not contracts, but unlawful agreements which are void in their inception: 9 Am. & Eng. Ency. of Law, 1st ed., 880; 15 Am. & Eng. Ency. of Law, 2d ed., 932.

The decision of this case may rest upon two grounds; and it may here be said that whether a contract not forbidden by law is immoral in its tendency and should be declared void is a question that must be left to the judgment of the court in which it is sought to be enforced; as when a voter agreed to exert his influence in an election against what he believed was for the public good, the agreement was held void, though the voter resorted to no unlawful means in exerting his influence: *Nichols v. Mudgett*, 32 Vt. 546. There are many instances of this kind mentioned in *Baron v. Tucker*, 53 Vt. 338, 38 Am. Rep. 684. In general, when a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury has resulted to the public. If it is immoral or contrary to the policy of the law, it will be declared void.

Contracts of the kind under consideration are clearly against public policy and invalid, for the reason that they tend to promote negligence on the part of railroad companies in respect to the personal safety of their employés.

But the policy of the law in respect to such contracts is declared in Vermont Statutes 3924, which is: "When an engineer, fireman, or other agent of a railroad is guilty of negligence or carelessness, whereby an injury is ³⁵⁰ done to

a person or corporation, he shall be imprisoned not more than one year, or be fined not more than one thousand dollars. This section shall not exempt a person or corporation from an action for damages."

Sections 3886 and 3887 forbid railroad companies having ladders or steps upon cars of their own to the top on the sides of the cars, and require that they be placed upon the ends or inside of the cars, and a forfeiture of fifty dollars a day is imposed as a penalty for failure to comply with the statute.

It is the law that courts will not enforce contracts made for the purpose of violating statutes, but will hold them inoperative and void: Robert's Digest, p. 152, pl. 54, et seq. This subject is fully considered in *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793, 26 Atl. 978; *Riley v. Jordan*, 122 Mass. 231. It was aptly said by Shaw, C. J., in *White v. Buss*, 3 Cush. 448, that: "The law, which prohibits the end, will not lend its aid in promoting the means designed to carry it into effect; . . . that it will not promote in one form that which it declares wrong in another." In *Elkins v. Parkhurst*, 17 Vt. 105, it was held that the imposition of a penalty implies prohibition. To the same effect is *Bank of United States v. Owens*, 2 Pet. 539, where the court quotes from the opinion in *Webb v. Pritchett*, 1 Bos. & P. 264, as follows: "Then how shall an action be maintained in that which is a direct violation of public law. The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the legislature; how, then, can we enforce a contract to do the very thing which is so much reprobated by the act." *Railroad Co. v. Lockwood*, 17 Wall. 357, does not controvert but sustains the rule of law above stated.

As the purpose of the contract was to exempt the defendant from its statutory liability for its negligence, and thus ³⁵¹ defeat the statute, it was an immaterial fact that one of the contracting parties was the next of kin and not the employé.

It is held that the employé may stipulate that, if injured through the fault of the railroad company, he will then elect whether to accept certain benefits by means of a relief fund created by the company alone or with other companies, and that he will not claim double compensation; but in such cases it is said that he does not stipulate for the future, but ac-

cepts compensation for the injury already received: *Pittsburgh etc. Ry. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 14 Am. & Eng. R. R. Cas., N. S., 678; *Johnson v. Philadelphia etc. R. R. Co.*, 163 Pa. St. 127, 29 Atl. 854. These cases do not support the defendant's position.

Griffith v. Earl of Dudley, 9 Q. B. Div. 357, *Western etc. R. R. Co. v. Bishop*, 50 Ga. 465, and *International etc. Ry. Co. v. Henzie*, 82 Tex. 623, 18 S. W. 681, cited by defendant, sustain its contention that such contracts are not against public policy, and other courts of last resort have upheld them; but the general holding is against their validity and for the reason, sometimes overlooked, that they offer a premium for carelessness: See *Carroll v. Missouri Ry. Co.*, 88 Mo. 239, 57 Am. Rep. 382, and notes.

This disposes of the only question in the case, the demurrer to the declaration being waived by the defendant's repleading: *Rea v. Harrington*, 58 Vt. 184, 56 Am. Rep. 561, 2 Atl. 475; *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380.

Judgment of the court below sustaining the plaintiff's demurrer and adjudging the pleas insufficient affirmed and cause remanded.

Contracts Prohibited by Law or morality are void as against public policy: *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 79 Am. St. Rep. 960, 62 Pac. 145. The courts of no state will hold valid any contract that is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates a public law: *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703; *Commonwealth etc. Ins. Co. v. Hayden*, 60 Neb. 636, 83 Am. St. Rep. 545, 83 N. W. 922. An agreement which discloses an intention to contravene a statute is vicious and unenforceable: *Brooks v. Cooper*, 50 N. J. Eq. 761, 35 Am. St. Rep. 793, 26 Atl. 978; *Haggerty v. St. Louis Ice etc. Co.*, 143 Mo. 238, 65 Am. St. Rep. 647, 44 S. W. 1114.

Contracts Releasing from Liability.—A carrier of passengers cannot stipulate against liability for its own negligence: *Jones v. St. Louis etc. Ry. Co.*, 125 Mo. 666, 46 Am. St. Rep. 514, 28 S. W. 883. A railway corporation cannot, by stipulation, exempt itself from liability to a passenger for its negligence, and this rule extends to an employé riding on a train as a passenger, though without the payment of fare: *Doyle v. Fitchburg R. R. Co.*, 166 Mass. 492, 55 Am. St. Rep. 417, 44 N. E. 611; *Williams v. Oregon etc. R. R. Co.*, 18 Utah, 210, 72 Am. St. Rep. 777, 54 Pac. 991. But an agreement by an employé of a railroad corporation, upon becoming a member of its relief department, that an acceptance of benefits from the relief fund shall release the company from liability for damages in case of injury is valid: *Beck v. Pennsylvania R. R. Co.*, 63 N. J. L. 232, 76 Am. St. Rep. 211, 43 Atl. 908. And a railroad company may contract with a third person for indemnity against loss for injuries to its passengers caused by its negligence: *Kansas City etc. Ry. Co. v. Southern Ry. News Co.*, 151 Mo. 373, 74 Am. St. Rep. 545, 52 S. W. 205.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

WHITNEY v. SPRATT.

[25 Wash. 62, 64 Pac. 919.]

PUBLIC LANDS—CANCELLATION OF ENTRY—NOTICE.
If, upon an *ex parte* proceeding for the cancellation of an entry of public lands, the officers of the national government have notice that the original entryman has transferred his rights to another, failure to give the transferee notice of the proceedings invalidates the cancellation. (p. 739.)

PUBLIC LANDS.—TIMBER LANDS unfit for cultivation are within the provisions of the timber purchase act of Congress, although they may become fit for cultivation by the removal of the timber. (p. 741.)

Dolph, Mallory, Simon & Gearin, for the appellants.

Stott & Stout and T. H. Ward, for the respondents.

⁶² REAVIS, C. J. Suit commenced by plaintiffs against defendant to remove a cloud from plaintiff's title to section 32, township 9 north, range 4 west, in Cowlitz county. Only the northeast and the southeast quarters of the section are in controversy upon appeal, plaintiffs having succeeded as to the other half of the section. The defendant answers, alleging that plaintiffs' claim to the northeast quarter of said section was deraigned through one Henness, who held under patent from the United States, and the southeast quarter was claimed by plaintiffs through one Walker, who likewise held under patent from the government; that ⁶³ such patents were wrongfully issued to Henness and Walker, and in truth and equity defendant is the owner of the two quarter sections, deraigning title to the northeast quarter from one Frank

Smith, and to the southeast quarter through one James M. Radcliffe; that Smith and Radcliffe entered, respectively, the said northeast and southeast quarters as timber land, on May 26, 1883, under the "timber and stone" act of Congress of June 3, 1878 (20 Stats. at Large, 89), and made application to purchase the same, both applications being made on the same day; that they each complied with the law in relation to the purchase of timber land, and each paid the purchase price thereof to the government and received a receiver's certificate therefor; that after the receipt of such certificates they, by warranty deed, duly transferred the respective tracts, for a valuable consideration, to A. N. Spratt, defendant; that on the 21st of January, 1886, the commissioner of the general land office erroneously canceled the entries of Smith and Radcliffe, and thereafter issued the patents to Henness and Walker. The proceedings of the land department are set out with particularity, and the answer alleges that such proceedings were invalid, because no notice was given to Spratt, the transferee of Smith and Radcliffe. It is also alleged that the commissioner of the general land office erred in his construction of the timber purchase act, in that he ruled that land which was chiefly valuable for timber, but which could be cultivated after the timber was removed, was not purchasable under the act, and held the entry was void on that ground. Defendant prays that he may be declared the equitable owner of the two quarter sections, that plaintiffs be adjudged to hold the patents in trust for him, and that conveyance of the legal title be made to him. By stipulation all the evidence and proceedings in the land department ⁶⁴ are in the record. Defendant introduced competent testimony tending to show that the entries of Smith and Radcliffe were made in good faith; that the two quarter sections entered by them were in fact timber land, more valuable for the timber than any other purpose, incapable of cultivation until the removal at great expense of the timber therefrom, and that such premises were in fact timber lands under the act of Congress.

As observed by counsel for appellants, two questions arise here: 1. Was Spratt, the transferee of the entrymen, Smith and Radcliffe, entitled to notice of the proceedings in the land office which resulted in the cancellation of their entries? It may be observed that the warranty deeds, executed by the entrymen conveying the lands to Spratt, were of record in

the auditor's office of Cowlitz county before the contest for cancellation was instituted, and that the special agent, who made the examination, and upon whose reports the proceedings were instituted, advised the land department of the transfers. It will thus be seen that knowledge of these transfers and of the interest of Spratt was conveyed to the land department before the notice of contest was given to the entrymen, and notice was directed to be given to the transferee by the commissioner of the general land office, but in fact was not given, and the transferee had no knowledge of the contest. The commissioner of the general land office, after a hearing, which was *ex parte*, canceled the entries of Smith and Radcliffe, and thereafter issued the patents to Henness and Walker, through whom plaintiffs deraigned title. It would seem upon these facts that the established rule as to notice pursued by the land department for many years was violated in the proceedings for cancellation: *United States v. Copeland*, 5 Land Dec. Dep. Int. 170; *United States v. Richardson*, 5 Land Dec. Dep. Int. 253; *Windsor* ⁶⁵ *v. Sage*, 6 Land Dec. Dep. Int. 440; *United States v. Thomas*, 9 Land Dec. Dep. Int. 576; *Fleming v. Bowe*, 13 Land Dec. Dep. Int. 78; *United States v. Newman*, 15 Land Dec. Dep. Int. 224.

The courts will take judicial notice of the rules and decisions of the land department: *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. Rep. 513.

The respective parties to the cause have also submitted a stipulation that knowledge of rules and decisions of the land department is recognized in the hearing of this cause. But apparently the necessity of such notice to foreclose the rights of the transferee has been set at rest by the highest authority. In *Guaranty Sav. Bank v. Bladow*, 176 U. S. 448, 20 Sup. Ct. Rep. 425, the pertinent facts for consideration here were that one Anderson filed his homestead application, thereafter commuted his homestead to a pre-emption entry, made final proof of his claim, and received a final certificate which was duly recorded in the proper county, and thereafter executed a mortgage upon said land in good faith, which mortgage was properly recorded. Thereafter the commissioner of the general land office held the entry of Anderson for cancellation on the ground that proper proof of residence was not shown, and thereafter Bladow, defendant, contested the entry of Anderson, and gave due notice of the hearing to Anderson, and upon said hearing Anderson's entry was canceled. The

mortgagee was not notified of the hearing. Upon these facts the court observed: "But the cancellation, although conclusive as to the entrymen upon all questions of fact, if made after notice to him, would not be conclusive upon the mortgagee, if made without notice to such mortgagee and with no opportunity on its part to be heard. That is, it would not prevent the mortgagee, before the issuing of a patent, from taking proceedings in the land department, and therein ⁶⁶ showing the validity of the entry, or from proceeding before a judicial tribunal, against the patentee, if a patent had already issued, and therein showing the validity of the entry; such proof in each case would, however, have to be made by evidence other than the certificate which had been canceled."

The defendant, in his answer, having alleged his equitable claim to the land in controversy, the invalidity of the cancellation of the entries of Smith and Radcliffe, and the lack of notice of the hearing in the land office to the transferee, Spratt, fully shows his right to a judicial hearing and determination of the controversy. He has not relied upon the certificate of the entries of Smith and Radcliffe, but has shown by evidence other than the certificates the validity of those entries. The findings of fact of the trial court show that the land in controversy was in fact timber land, within the provisions of the act of Congress, and that the entries were made in good faith. We have reviewed the testimony, and we fully approve the findings. We have examined with care the authorities adduced by counsel for appellants. The case of *American Mtg. Co. v. Hopper*, 56 Fed. 67, determines only that the certificate of payment issued to a pre-emptor of public lands may be canceled by the land department; that the certificate is merely an equitable interest in the entryman, and a purchaser from him before a patent issues cannot claim to be protected, as a bona fide purchaser, from cancellation of the certificate, on the ground that it is fraudulent and void. In that case the transferee had no notice, but he relied entirely on the validity of the certificate, and did not show in fact that the entry was valid. In the same case on appeal in the ninth circuit (64 Fed. 553), it was determined that, where the land department cancels after issuance to a pre-emptor of a final certificate on the ground that the entry was fraudulent, and issues a patent to ⁶⁷ another, the burden is on such pre-emptor, or those claiming under him, in an action to recover the land from the patentee, to

show that the department erred in adjudging the title to the defendant, and that the transferee was not entitled to protection as a bona fide purchaser. This is not inconsistent with the determination in *Guaranty Sav. Bank v. Bladow*, 176 U. S. 448, 20 Sup. Ct. Rep. 445. Some of the expressions used in the opinion in *Cook v. Blakely*, 6 Kan. App. 707, 50 Pac. 981, do not seem to be in accord with the weight of authority.

2. Did the commissioner of the general land office err in his construction of the timber act? We are inclined to conclude that he did. An examination of the facts before the commissioner and his construction of the law discloses that he determined that the lands, which were chiefly valuable for timber at the time of the entry, and then unfit for cultivation, were not within the provisions of the timber purchase act. This construction was erroneous: *United States v. Budd*, 144 U. S. 154, 12 Sup. Ct. Rep. 575, where facts of a similar nature were before the court.

The judgment of the superior court is affirmed.

Fullerton, Anders, and White, JJ., concur.

The Cancellation of a Public Land Entry without notice to, and a hearing of, the interested parties is invalid: *Delles v. Second Nat. Bank*, 7 Wyo. 66, 75 Am. St. Rep. 875, and note, 50 Pac. 190.

FISCHER v. WOODRUFF.

[25 Wash. 67, 64 Pac. 923.]

MORTGAGES—ILLEGAL CANCELLATION AFTER ASSIGNMENT—SUBSEQUENT ENCUMBRANCERS.—Satisfaction of a mortgage upon the record by a mortgagee, after he has assigned it, does not operate to cancel the mortgage as against a subsequent encumbrancer in good faith and for value, if the assignee is not required to record his assignment. (p. 744.)

MORTGAGES—ILLEGAL CANCELLATION—ASSIGNMENT—SUBSEQUENT ENCUMBRANCERS—ESTOPPEL.—An assignee of a mortgage, not required by statute to record his assignment, is not estopped by an illegal, though apparently regular, cancellation of the mortgage, from asserting it against a subsequent encumbrancer in good faith and for value, in reliance upon such cancellation and without notice of such assignment, if the assignee had no notice of the cancellation prior to the time the subsequent encumbrance attached. (p. 745.)

MORTGAGES—RIGHTS OF ASSIGNEE.—If a bona fide purchaser of a note secured by mortgage assigns it after maturity,

the assignee is subject to such defenses only as could have been urged against his assignor, unaffected by the fact that his purchase was made after the maturity of the note. (p. 745.)

MORTGAGES—PAYMENT OF TAXES BY JUNIOR MORTGAGEE—LIEN.—A junior mortgagee who pays taxes on the mortgaged premises to protect his lien, and without notice of the prior mortgage, is entitled to have the sum thus paid declared a lien superior to such mortgage. (p. 745.)

E. R. York and P. Tillinghast, for the appellant.

I. Bronson, for the respondents.

OS FULLERTON, J. On September 8, 1891, the defendant, Samuel C. Woodruff, who was then an unmarried man, made and delivered to the defendant, George G. Mills, his promissory note for four thousand dollars, payable on or before two years after date, with interest. At the same time, and as security for the payment of the note, Woodruff executed and delivered to Mills a mortgage upon certain real property situated in Thurston county. On the fourteenth day of the same month the mortgage was duly recorded in the auditor's office. Within ninety days after the execution of the note—the exact date not being shown—Mills, for value, indorsed the note to the defendant Pauline Leberman, who on the sixth day of February, 1893, indorsed it to the co-partnership ⁶⁹ of Fischer & McDonald. McDonald subsequently died, and through probate proceedings had in the administration of his estate, the note was, after its maturity, sold and indorsed to the respondents in this action. No formal assignment of the mortgage was ever made, and on the eighteenth day of July, 1892, it stood on the records in the name of, and as the property of, Mills. On that day Mills, while the note was in the hands of Pauline Leberman unpaid, without her knowledge or notice to her, acknowledged on the margin of the page on which the mortgage was recorded, over his signature, satisfaction in full of the mortgage. Two days thereafter the appellant made a loan to Woodruff of eight thousand dollars, taking his promissory note for that sum, and a mortgage upon the above-mentioned property as security. At that time it had no notice or knowledge that Mills, at the time he undertook to satisfy the mortgage, had parted with his interest in the note; nor did it have notice that the note remained unpaid, or that Mills had no authority from the owner and holder of the note to satisfy the mortgage of record. In 1897 the appellant foreclosed its mortgage, sold the mortgaged premises, bid them in at the sale, and now

holds a sheriff's certificate of sale therefor. Neither the respondents nor their immediate assignors, however, were made parties to these foreclosure proceedings. The present action is brought to foreclose the original mortgage. The complaint is in the usual form, and the answer, after denying the allegations of the complaint, sets out substantially the foregoing facts. The trial court adjudged the respondents' mortgage to be an existing lien superior to the rights of the appellant, and entered a judgment of foreclosure accordingly. The appeal is from that judgment.

The appellant moved in the court below to make the complaint more definite and certain, which motion the ⁷⁰ trial court overruled. It also served interrogatories upon the respondents, to which they filed answers. It then moved for an order requiring the answers to be made more definite, which motion being denied, it moved for a dismissal of the action on the ground that the answers filed to the interrogatories were so indefinite as to amount to a refusal to answer, which motion was also denied. Error is assigned on these several rulings of the court, and a large space of the brief is given to an argument of these questions. We find no merit in these assignments. The complaint contained every necessary allegation, and the answers to the interrogatories were as definite as the facts within the knowledge of the respondents permitted them to be made. This is sufficient to comply with the requirements of the statute.

The principal question is whether the satisfaction of a mortgage upon the record by a mortgagee, after he had assigned it, operates to cancel the mortgage as against a subsequent encumbrancer for value and in good faith. It is the rule in this state that a mortgage conveys no title to the mortgaged premises; it is a mere security, and is satisfied and extinguished by the performance of the condition the performance of which it is given to secure: *Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412; *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268. It is also a familiar rule, at least in those jurisdictions where a mortgage is a lien merely, that, where a debt is secured by a mortgage, the debt is the principal, and the mortgage the incident, and that an assignment of the debt is an assignment of the mortgage. From these principles it is clear that Mills, when he indorsed the note sued upon to Mrs. Leberman, parted not only with all his interest in the note, but with his interest in the mortgage, also,

and stood thereafter with reference thereto as a stranger, and could no more ⁷¹ legally cancel and satisfy the mortgage of record than could any stranger to the record. Whether, therefore, his apparently legal cancellation of the mortgage estops the assignee of the note from afterward asserting the lien of the mortgage as against the appellant, who is an encumbrancer for value and in good faith, depends upon the recording acts. As the purpose of these acts is to protect subsequent bona fide purchasers and encumbrancers against prior unrecorded liens and conveyances, their propriety and utility may be conceded; but registration of instruments affecting property rights and titles is purely the creation of the statute, and, unless the statute requires the assignee of a mortgage to record the assignment, he is not guilty of negligence in failing to do so nor is he estopped by an illegal, though apparently regular, cancellation of the mortgage from asserting it, even against a subsequent bona fide encumbrancer, if he had no notice of its cancellation prior to the time the subsequent encumbrance attached: *Oregon Trust Co. v. Shaw*, 5 Saw. 336, Fed. Cas. No. 10,556; *Reeves v. Hayes*, 95 Ind. 521; *Lee v. Clark*, 89 Mo. 553, 1 S. W. 142; *Joerdens v. Schrimpf*, 77 Mo. 383; *Bamberger v. Geiser*, 24 Or. 203, 33 Pac. 609.

The inquiry is, then, Did the recording acts, at the time of the assignment of this note and the time of the purported cancellation of the mortgage by Mills, require that an assignment of a mortgage should be recorded? In *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746, we held that they did not. The question was squarely presented in that case, and the ruling was made upon facts somewhat similar to the case at bar. The appellant questions the correctness of that decision, and asks that it be overruled; but a re-examination has convinced us that the case correctly interprets the statutes, and, were it an original question, we would hold the same way. As the reasons ⁷² for the conclusion are fully stated in the opinion in that case, it is unnecessary to repeat them here.

It is next argued that the rule is not applicable to the respondents in this case, because, it is said, they are not bona fide assignees of the note. It is not disputed that the respondents purchased for value, and without actual notice that the mortgage appeared on the record to be canceled and satisfied in full; but it is said that, because they purchased after

maturity, they must be held to have taken with notice of the satisfaction, and cannot now assert their want of actual knowledge. This is not the rule. It is not pretended that Mrs. Leberman was estopped, or would be had she attempted to foreclose the mortgage. Such rights as she had passed to the respondents by the several assignments.

The trial court found: "That on the twenty-sixth day of November, 1897, the Provident Life and Trust Company, under the terms and authority given to it by its said mortgage for eight thousand dollars, paid to the treasurer of Thurston county, Washington, the taxes duly levied and assessed against said mortgaged premises, and which were a lien thereon, for the years 1893, 1894, 1895 and 1896, amounting to the sum of eighteen hundred and four dollars and eighty-six cents; that said sum has not been repaid to the said company, but is now due and owing to it, with interest thereon from November 26, 1897, at the rate of twelve per cent per annum; that said payment of said taxes was made by said company without any knowledge or information of the rights, interest, or lien alleged and claimed by the plaintiffs herein in, to, or upon said mortgaged premises, but believing that the said mortgage of said company for eight thousand dollars thereon was the first lien upon said premises."

It refused, however, to adjudge that the amount so paid was a lien on the mortgaged premises, superior to the mortgage of the respondents. In this we think the court erred. These taxes were a paramount lien upon the premises,⁷³ superior to the lien of the respondents' mortgage, and for the nonpayment of which the property might have been sold, and a superior title to the respondents' mortgage given. The payment was made in good faith by the appellant, without knowledge of the respondents' rights, for the purpose of protecting its lien upon the premises, and it would be far from just to give the respondents the benefit of these payments. There is nothing in the facts of the case that militates against the right, and we think that equity requires that they be declared a superior lien upon the lands in favor of the appellant.

The cause will therefore be remanded, with instructions to the lower court to so far modify the judgment appealed from as to allow the appellant a superior lien upon the premises for the amount of taxes paid by it, with legal interest from the time of such payment; also adjudging to the appellant

any surplus that may remain after the satisfaction of the respondents' mortgage. The appellant will be allowed its costs on this appeal.

Reavis, C. J., and Anders and Dunbar, JJ., concur.

An Assignee of a Mortgage takes it subject to all the defenses which were valid between the original parties. This rule relates only to defenses arising out of the matters inherent in the contract by which the deed in question is evidenced and existing before it was signed. New equities arising or defenses accruing thereafter are not within its application: *Merchants' Bank v. Weill*, 163 N. Y. 486, 79 Am. St. Rep. 605, 57 N. E. 749. He does not take it subject to the equities of third persons of which he has no notice: *Moffett v. Parker*, 71 Minn. 139, 70 Am. St. Rep. 319, 73 N. W. 850. See, also, *Quimby v. Williams*, 67 N. H. 489, 68 Am. St. Rep. 685, 51 Atl. 862. He cannot be charged with constructive notice of anything subsequent to the mortgage, except its assignment or satisfaction duly entered of record: *Peters v. Jamestown Bridge Co.*, 5 Cal. 334, 63 Am. Dec. 134. A mortgagee, having sold the note secured by the mortgage, cannot cause satisfaction of it to be entered on the record to its destruction as a security to the noteholders: *Roberts v. Halstead*, 9 Pa. St. 32, 49 Am. Dec. 541. See, further, *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714, 67 N. W. 452; *Curtis v. Moore*, 152 N. Y. 159, 57 Am. St. Rep. 506, 46 N. E. 168.

An Assignment of a Mortgage is a conveyance which should be placed on record in order to render it valid against subsequent encumbrancers and purchasers: *Henniges v. Paschke*, 9 N. Dak. 489, 81 Am. St. Rep. 588, 84 N. W. 350; *Swasey v. Emerson*, 168 Mass. 118, 60 Am. St. Rep. 368, and cross-reference note thereto, 46 N. E. 426.

NORTHWESTERN LUMBER COMPANY v. CHEHALIS COUNTY.

[25 Wash. 95, 64 Pac. 909.]

TAXATION.—OCEAN-GOING TUGS registered in another state and owned by a foreign corporation are taxable in the state where they have their situs, and when they are engaged in plying wholly within the waters of the state. (p. 748.)

OFFICERS—COLLATERAL ATTACK ON TITLE.—The right of an assessor to his office cannot be collaterally attacked in an action to enjoin the collection of taxes levied by him. (p. 754.)

S. M. Heath, for the appellant.

W. H. Abel, prosecuting attorney, for the respondents.

95 REAVIS, C. J. Suit to enjoin the collection of taxes levied upon property belonging to appellant in Chehalis county. The assessor listed and assessed to appellant some

reservoirs and lines of pipes in the town of Hoquiam, and also listed and assessed three steam tugs—the “Traveler,” “Astoria,” and “Printer.” The complaint states that the acts of the assessor were invalid, and questions his right to his ⁹⁶ office as assessor, and alleges that he arbitrarily, fraudulently, and maliciously overvalued personalty in the waterworks; that the tugs were ocean-going tugs, and in use wherever charters were available; that each was registered, under section 4319 of the United States Revised Statutes, at the port of San Francisco, and was assessed and paid taxes in the state of California; that plaintiff was a corporation organized under the laws of California and qualified to do business in the state of Washington. The superior court, after trial, found substantially the following facts: That the tugs “Traveler,” “Astoria,” and “Printer” and the waterworks were assessed at a fair cash valuation required by law; that all the property mentioned was a part of the taxable personal property situate in Chehalis county, and said tugs, and each thereof, were so blended with the personal property in general situated in said county that it was impossible to distinguish it therefrom; that such property, and the whole thereof, was controlled at Hoquiam by the resident management of the plaintiff corporation, and each of said tugs was and has been engaged in plying wholly within the waters of this state. It concluded that the tax was legal and justly due, and rendered judgment dismissing the action.

The material controversy here is the validity of the assessment upon the three tugs. Counsel for plaintiff urges that, as these tugs were registered in the port of San Francisco, they are not liable to taxation in this state. The question is not entirely free from doubt. In 1854 the right to tax a vessel engaged in interstate commerce was considered by the supreme court of the United States in *Hays v. Pacific Mail Steamship Co.*, 17 How. 596. The facts were that the steamship company was incorporated under the laws of New York; that all the stockholders were residents and citizens of that state; that the principal office for transacting business was in the city of New ⁹⁷ York, but the company had agencies in the cities of Panama, New Grenada, and San Francisco, California, and had a naval yard and ship yard for repairs at Benicia, California; that on the arrival of the ships at the port of San Francisco, they remained no longer than to land passengers, mail, and freight, usually done in a day,

then proceeded to Benicia for repairs and refitting until the commencement of the next voyage, usually some ten or twelve days; that the business they were engaged in was transportation of passengers and merchandise, treasure, and the United States mail between the city of New York and the city of San Francisco, by way of Panama, and between San Francisco and different ports in the territory of Oregon; that the company was the sole owner of the vessels, and no portion of the interests was owned by citizens of California; that the vessels were all ocean steamships, employed exclusively in navigating the ocean, and each of them was registered at the custom-house in New York, where the owners resided; that taxes had been assessed upon all the capital of the company represented by the steamers in the state of New York under the laws of that state; that the vessels were assessed in the county of San Francisco, California, and the suit was to recover taxes paid under protest. The tax collector demurred to the complaint, and judgment was given for the plaintiffs. The court, in affirming the judgment, referred to the federal statutes of the 31st of December, 1792, and the 29th of July, 1850, which provide for the registration of vessels at the port which shall be at or nearest the owner, if there be but one, or if more than one, nearest the place where the husband or the acting and managing owner usually resides, and also the provision for the recording of bills of sales, mortgages, and conveyances in the office of ⁹⁸ the collector of customs where the vessel is registered or enrolled, and observed: "These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered and which must be the nearest to the place where the owner or owners reside."

In speaking of the vessels it was said: "They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board, independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which

belongs the regulation of commerce with foreign nations and between the states. . . . Besides, whether the vessel, leaving her home port for trade and commerce, visits in the course of her voyage or business several ports, or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the state and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them temporarily, and for a purpose wholly excluding the idea of permanently abiding in the state, or changing her home port."

Again, in *Morgan v. Parham*, 16 Wall. 471, the facts were that a vessel, the "Frances," was brought to Mobile, Alabama, which was duly registered at the port of New York, under the ownership of the plaintiff, according to the acts of Congress. The plaintiff was, and had since remained, a citizen of New York, and the vessel was the ⁹⁹ property of the plaintiff. The vessel was assessed as personal property in the city of Mobile. The tax remaining unpaid, the vessel was seized by the collector of the city. The owner brought an action for trespass against the collector for such seizure, and the collector justified by virtue of his tax warrant. The vessel was brought to Mobile in 1865. From that time until 1870 it had been employed as a coasting steamer between Mobile and New Orleans. In January, 1867, the vessel was regularly enrolled at the custom-house by her master as a coaster, and license was issued in 1868 and 1869 as a coaster, and the "Frances" was one among several of a daily line of steamers plying between Mobile and New Orleans. The captain of the vessel was a resident of Mobile, and the agent conducting the business of the vessel at Mobile was resident there, occupying an office for such business, and paid the persons who assisted him, but was under the control of his superior agent, residing in New Orleans, who employed and paid the captain. A wharf and office in Mobile were occupied for the use of the vessels. They transported the mails, freight, and passengers between Mobile and New Orleans. The court held the tax was invalid, and said: "The fact that the vessel was physically within the limits of the city of Mobile at the time the tax was levied does not decide the question. Thus, if a traveler on that day had been passing through that city in his private carriage, or an emigrant with his worldly goods on a

wagon, it is not contended that the property of either of these persons would be subject to taxation as property within the city. It is conceded by the respective counsel that it would not have been. On the other hand, this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steamboat or a post-coach engaged in a local business within a state may be subject to local taxation, although it carry the ¹⁰⁰ mail of the United States. The commerce between the states may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. It is not, therefore, upon this principle that we are to decide the case. . . . The imposition in this class of cases was a tax upon the use of the public waters of the country, and tended immediately to interfere with and to obstruct the commerce between the states. In the instance before us the tax was upon a vessel at the wharf. It was in this respect as if a tax had been laid upon lumber or cotton lying on the dock at Mobile. This vessel was owned by and employed in the service of a resident of the state of New York. It was primarily and presumptively taxable under the authority of that state, and of that state only."

And again the court concludes: "It is the opinion of the court that the state of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that state, but was there temporarily only, and that it was engaged in lawful commerce between the states, with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value."

It is also said that it was immaterial whether the steamer, the "Frances," was actually taxed in New York or not; she was liable to taxation there.

Again, in *Moran v. New Orleans*, 112 U. S. 69, 5 Sup. Ct. Rep. 38, a municipal ordinance of the city of New Orleans to establish the rate of license for professions, callings, and other business, which assessed and directed to be collected from persons owning and running towboats to and from the Gulf of Mexico and the city of New Orleans was adjudged to be a regulation of commerce among the states and invalid. It will be observed that the first two cases seem to put the invalidity of the tax upon the ground of an interference with commerce among the ¹⁰¹ states, the regulation of which is exclusively with Congress; and in each instance the vessels

were engaged in interstate commerce, and were only temporarily in the port where the tax was attempted to be levied. We have been unable to find any adjudication of the supreme court of the United States specifically determining that the registry of the vessel conclusively fixes its situs. The registry is presumptive evidence of such situs. Counsel have, however, referred us to an authority (*Roberts v. Township of Charlevoix*, 60 Mich. 197, 26 N. W. 878) which seems to determine that a vessel enrolled, licensed, or registered under the United States navigation laws does not, by engaging in business within a state, become subject to its taxing power if the owner is a nonresident. Again, in the case of *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 19 South. 640, the facts were that the vessel was owned by a corporation of New York, with its headquarters and chief office in the city of New York, and was duly registered in the custom-house at that port, and a tax had been regularly levied upon it in New York. The New York corporation maintained a line of boats on St. John's river for a portion of the year, engaged in the business incident to steamboats plying upon a river; but at different times the vessels went to any other waters which supported profitable engagements, and were engaged upon waters in other states. It was adjudged that the state of Florida could not levy a tax upon the vessels, the court observing: "Under the admitted facts of this case we are of the opinion that the vessels of the appellee were not subject to taxation in Duval county. The vessels were owned by a New York corporation, and had acquired a situs in that state by being duly registered in the port of New York, ¹⁰² the nearest to the residence of the owner, and were engaged in commerce in that state, where, it is conceded, the most profitable employment could be procured for them. The mere fact of being employed in interstate commerce would not exempt them from taxation, and we do not say that registration in a foreign port and nonresident ownership should control absolutely, but such ownership and registration render them primarily and presumptively taxable only in their home port."

But in the well-considered case of *National Dredging Co. v. State*, 99 Ala. 462, 12 South. 720, the facts were that the dredging company was a Delaware corporation, and the tugboat was registered at Wilmington, Delaware, and afterward was in Mobile Bay for a long time, engaged in dredging in connection with other scows and machinery owned by the same

company. The contract for dredging was with the government of the United States. The court observed of the tug-boat "Curtis": "A special consideration is advanced in support of its nontaxability. It is a sea-going vessel, propelled by steam, and is entitled to registry under statutes of the United States at the port of its owner's domicile. As a matter of fact, it is registered at the custom-house in the city of Wilmington, Delaware. On this the contention is, that that being home, it cannot be taxed elsewhere. There are many cases which hold that such vessel, engaged in commerce between its home port and others, or even wholly between other ports than that of its registry, can be taxed only at the port of registry. It is not our purpose to question these decisions; it is not necessary that we should. They all proceed upon the theory that vessels thus engaged are never in foreign jurisdiction except temporarily, and as an incident to the commerce to which they are devoted, and hence that they do not and cannot acquire a situs in foreign ports for the purposes of taxation; they do not become incorporated with the property of other states and countries which they touch intermittently, are never indefinitely there, and ¹⁰³ their business, the work they perform, the uses to which they are put, are not done and performed within, and are not local to, the foreign state or country." And the court concludes: "The question, indeed, is at last one of situs in fact, and where this is shown neither foreign registry nor foreign ownership is of any consequence."

Sound reasons exist for the right of the state to tax these vessels that are permanently here transacting local business. They receive the full protection of the local government, and, if mere registry in another port is conclusive against the right to tax here, a boat can operate in our local waters, confined entirely to local business, and, if owned elsewhere, may evade all taxation in this state. Such construction should not be adopted unless imperatively demanded by superior authority. Under the revenue law of this state, personal property is taxed at its situs, and without reference to the residence of the owner.

We have examined the evidence in the record upon the exception made to the findings of the superior court and fully coincide with the findings. The evidence discloses that for from four to seven years the three tugs have been at Hoquiam, in Chehalis county; that their business has been towing in the waters of Gray's and Willapa Harbors in this state; that the

corporation plaintiff, for some fifteen years last past, has owned and operated large sawmills, owns large areas of timber lands, and has manufactured from twenty to thirty million feet of lumber annually; that these tugs tow vessels usually from Hoquiam through the harbor to the ocean; that all contracts of towage are made by the captains of the respective tugs, who reside at Hoquiam; that the crews reside there; that the assistant secretary and manager of the company resides ¹⁰⁴ there; that all accounts are rendered to him there; that the captains and crews are paid there, and the only absences of the tugs from these harbors shown by the record have been for the purpose of repairs. They appear to have been used for all these years as appurtenant to, and a part of, the lumbering plant and business of the plaintiff in Chehalis county. Upon these facts, we conclude that the situs in fact of the three tugs is in Chehalis county, and that there was a valid assessment levied upon their value. The objection to the assessment upon the pipe-lines and reservoirs has been considered, and we are not inclined to disturb the conclusion of the superior court upon such assessment. We do not think the objection to the right of the officer who made the assessment to his office can be made here. The record shows that he was certainly a de facto assessor, exercising properly all the functions of the office.

The judgment is affirmed.

Dunbar, Fullerton and Anders, JJ., concur.

If a Vessel is Regularly Employed in one state, though registered at the port of the owner's domicile in another state, it is taxable in the former. When situs is shown, neither foreign registry nor foreign ownership is of consequence: See the monographic note to *Buck v. Miller*, 62 Am. St. Rep. 472.

The Title of an Officer de facto is not subject to collateral attack: *State v. Barnard*, 67 N. H. 222, 68 Am. St. Rep. 648, 29 Atl. 410; *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382, 62 Pac. 661; *Jewell v. Gilbert*, 64 N. H. 13, 10 Am. St. Rep. 357, 5 Atl. 80.

GROVELAND IMPROVEMENT COMPANY v. FARMERS' SUPPLY COMPANY.

[25 Wash. 344, 65 Pac. 529.]

CONVERSION—EVIDENCE.—If a corporation sues for the conversion of a crop, and the defendant puts in evidence a lease from plaintiff to him of the land, upon which the crop is grown, evidence is admissible in rebuttal to show that the corporate officers executing the lease were intruders in office, and executed the lease without authority, and with knowledge of that fact by the defendant. (p. 756.)

RECEIVERS—RATIFICATION OF INVALID CONTRACT. The acceptance by a receiver of rents reserved under an invalid lease does not amount to a ratification thereof, if he has no knowledge of the material facts and circumstances. (p. 756.)

A. W. Buddress and George C. Hatch, for the appellant.

Trumbull & Trumbull, for the respondent.

344 FULLERTON, J. This was an action of conversion, originally begun by the Groveland Improvement Company, a corporation, as plaintiff, against the respondent, to recover the value of a certain quantity of hay which it alleged the respondent had unlawfully taken and carried away to the damage of the plaintiff. The complaint was in the usual form. The answer was a general denial. After issue joined, one H. M. Fisher was appointed receiver of the plaintiff corporation, and was thereafter substituted as **345** plaintiff. On the trial of the action, after the appellant had introduced evidence tending to prove a prima facie case, the respondent introduced in evidence a written lease, purported to have been executed by the Groveland Improvement Company to the respondent, leasing to it certain lands for a term of eleven months; also evidence showing that the hay in controversy had been grown upon the leased lands during the term of the lease, and that it was a part of the income from the property, which inured to it by the conditions of the lease. It also showed that the receiver, subsequent to his appointment, had received from respondent a part of the rental reserved by the terms of lease. In rebuttal, the appellant offered evidence tending to show that the respondent had taken possession of the leased lands over the protest of the duly elected officers of the Groveland Improvement Company, who had authority to manage its affairs and transact its business; that the lease upon which the respondent relied was executed by persons who had without lawful right, and by force and fraud, in-

truded themselves into the offices of that corporation and usurped the functions of its lawful officers, and that the respondent's manager was one of such persons; that these persons had been ousted from the offices they had usurped by the judgment of the court, and that proceedings therefor had been begun and notice thereof served upon the respondent's manager prior to the time of the purported execution of the lease; and, further, that the rental paid to the receiver was received by him without knowledge that the present action was pending, or that there was a dispute as to the respondent's rights under the lease. The trial court refused to permit this evidence to go to the jury, whereupon the appellant rested. The court then entered an order discharging the jury, and directed judgment for the respondent.

³⁴⁶ In our opinion, the trial court erred in rejecting the evidence proffered in rebuttal. If it be true that the lease upon which the respondent relied was executed in the name of the Groveland Improvement Company by persons who had unlawfully intruded into its offices, and the respondent had knowledge of that fact when it accepted the lease, such lease would afford it no protection; it would be a mere trespasser upon the lands described in the lease, and liable to the appellant for the value of the hay which it took and converted to its own use. The rule that third persons dealing with de facto officers of a corporation are protected in such dealings has no application. The rule is designed for the protection of innocent third persons, who have dealt with such officers without knowledge of their true character. But here the evidence offered tended to show that the manager of the respondent, who represented it in the making of the lease, was one of the persons intruding into the offices of the corporation which purported to execute the lease; and, as he had knowledge of the lack of authority of the intruders to represent the corporation, his knowledge must be imputed to the respondent.

Nor did the acceptance by the receiver of a part of the rental reserved in the lease amount to a ratification. Aside from his lack of power to ratify it, without the consent of the court appointing him, knowledge of all the material facts and circumstances is essential to an effective ratification. This the appellant offered to show the receiver did not have.

The judgment appealed from is reversed and the cause remanded for a new trial.

Reavis, C. J., and Dunbar, Anders, and White, JJ., concur.

The Acts of De Facto Officers of a private corporation are valid as to the public and third persons: *Zearfoss v. Farmers' etc. Institute of Northampton Co.*, 154 Pa. St. 449, 35 Am. St. Rep. 848, 26 Atl. 211. A party in possession of an office in a corporation is presumed regularly elected and entitled to hold it: *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

Ratification of a Transaction must be with knowledge of the facts: *Bierman v. City Mills Co.*, 151 N. Y. 482, 56 Am. St. Rep. 635, 45 N. E. 856; *Easton v. Somerville*, 111 Iowa, 164, 82 Am. St. Rep. 502, 82 N. W. 475.

KALB v. GERMAN SAVINGS AND LOAN SOCIETY.

[25 Wash. 349, 65 Pac. 559.]

JUDGMENTS—COLLATERAL ATTACK.—If, after judgment in a suit to quiet title that defendant has no interest in certain lands, he brings an action seeking to have himself decreed a cotenant therein, such action is a collateral attack upon the prior judgment, and cannot be maintained. (p. 759.)

ACTIONS AGAINST MINORS—SUFFICIENCY OF SUMMONS.—If the statute provides that in an action against a minor summons shall be served by delivering a copy to such minor personally, and also to his father, mother, or guardian, service of summons upon the mother of the minor defendant, directed to her as such mother only, and directing her to appear and defend the action, together with personal service upon the minor, is a sufficient compliance with the statute. (p. 762.)

JUDGMENTS—PRESUMPTIONS.—Every fact not negatived by the record is presumed in favor of the support of a judgment of a court of general jurisdiction. (p. 763.)

JUDGMENTS—PRESUMPTION—SERVICE.—If a judgment of a court of general jurisdiction recites that service of summons was duly made, it must be presumed that that fact appeared to the court by competent proof. (p. 763.)

EJECTMENT—PLEADING.—A complaint in an action to quiet title alleging possession of the premises in the plaintiff, and title in fee in him, and that defendant claimed an estate or interest therein adverse to him, is sufficient to give the court jurisdiction of the subject matter, for the purpose of determining such claim. (p. 763.)

JUDGMENTS—TRIAL AT CHAMBERS.—A judgment in ejectment is not void for the reason that it recites that the cause came on for hearing before a judge at chambers, when the trial of and judgment in such action at chambers is expressly authorized by statute. (p. 763.)

JUDGMENTS—COLLATERAL ATTACK—EVIDENCE.—In a collateral attack upon a judgment against a minor, evidence that no notice of the time or place of trial was given to his guardian ad litem is not admissible to oust the court of jurisdiction. (pp. 764, 765.)

Gleeson & Stayt, for the appellant.

Happy & Hindman, for the respondents.

351 MOUNT, J. William and Sarah Dennis were married on July 2, 1878. In 1879, a son, Herbert, was born to them. In 1882, J. M. Glover and wife, who were the owners of the west half of lot 3, in block 17, of the resurvey and addition to Spokane Falls, Washington, sold the said property to said Sarah Dennis. In 1884, William Dennis died intestate, leaving his widow and son, Herbert, as only heirs. In 1884, after the death of her husband, Sarah Dennis, a widow, sold the said realty to Henry French. In 1889, said French brought an action in the superior court of Spokane county to quiet his title against the claim of said minor, Herbert Dennis. Service of summons was had upon said Herbert and his mother. Thereafter a guardian ad litem was appointed and appeared in said action, but did not in his answer set forth the interest of said minor, but submitted "his rights and interests to the tender consideration of this honorable court, and prays strict proof of the matters alleged in plaintiff's complaint." The court upon the trial found that said Herbert had no interest in the said property, and that Sarah Dennis, at the time she sold said property, had title in fee in her own separate right, and entered a decree accordingly quieting title in said French. The respondents on this appeal are the successors in interest of said French. This action **352** was brought in the lower court by C. S. Kalb, as general guardian of Herbert Dennis, against the respondents, claiming to be a tenant in common of said property, and praying to be so decreed. Upon a trial the court found for defendants, and that the judgment above referred to in French v. Dennis was and is a valid judgment and decree, unreversed and in full force and effect, and entered judgment for defendants. Plaintiff appeals.

It will be readily observed that this is not an action to set aside the judgment in French v. Dennis, but one seeking to have Herbert Dennis, the defendant in that action, declared to have an interest in said property, notwithstanding a judgment declaring he has no interest. It is well, therefore, to determine at the outset whether this action is a direct or collateral attack upon that judgment. No mention of the judgment in French v. Dennis is made in the complaint herein. The answer, after denying all the allegations in the complaint, sets up the judgment as a bar to plaintiff's right of recovery, even if he ever had any interest in the property. The reply, after denying the allegations of the answer, sets out facts which plaintiff claims invalidated the said judgment. Van-

fleet, in his work on Collateral Attack, at section 3, says: "A collateral attack on a judicial proceeding is an attempt to avoid, defeat, or evade it, or to deny its force and effect in some manner not provided by law. . . . When a judicial order, judgment, or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial errors is a collateral attack. Familiar instances are where a person relies on a judgment as a justification for a trespass . . . or to show his right or title in . . . ejectment, trespass to try title, or suit to quiet title. That the objection to the judgment for judicial errors in such cases is a collateral attack, the cases all agree": Black on Judgments, sec. 252; Morrill v. Morrill, 20 Or. 96, 25 Pac. 362, 23 Am. St. ³⁵³ Rep. 95; Finley v. Houser, 22 Or. 562, 30 Pac. 494; Kizer v. Caufield, 17 Wash. 417, 49 Pac. 1064.

Under all the authorities, this action is, and must of necessity be, a collateral attack upon the judgment in French v. Dennis, and must be so treated. It is so treated by appellant because his whole argument on this appeal is directed to show that the court erred in admitting the judgment in French v. Dennis in evidence in this case, upon the ground that said judgment is void. With this point determined, we proceed to examine errors alleged.

It is contended on the part of appellant that the court rendering judgment in French v. Dennis had no jurisdiction of the person of defendant, who was a minor. The law in reference to commencing civil actions in force in 1889—the time that action was commenced—was as follows:

"Section 1. That civil actions in the several district courts of this territory may be commenced by filing a complaint and issuing summons signed by the clerk of the court and under the seal of the court substantially as follows:

"Territory of Washington, }
County of ———. } ss.

(Here insert names of
parties plaintiff and
defendant.)

"To the above-named defendant: You are hereby requested to appear in the district court of the ——— judicial district, holding terms at ———, within twenty days after the service of this summons, exclusive of the day of service, if served in the above county, if not served in said county, but

in said district, in thirty days, if served in any other judicial district in the territory in forty days, and answer the complaint of the above-named plaintiff now on file in the office of the clerk of said court, and unless you so appear and answer, the same will be taken as confessed and the prayer thereof granted.

354 "Witness my hand and the seal of said court this _____ day of _____, 18____.

"_____,
"Clerk of said Court."

"Sec. 4. The summons shall be served by delivering a copy thereof, as follows: If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, guardian, or if there are none within this territory, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed, if such there be": Laws 1887-88, pp. 24, 25.

The summons served upon Herbert Dennis, who was then a minor under the age of fourteen years, with the return thereto, was as follows:

"Territory of Washington, }
County of Spokane. } ss.

"In the district court of the territory of Washington, in and for the fourth judicial district thereof, holding terms at Spokane Falls, Spokane county, in said territory.

"HENRY FRENCH,
Plaintiff, }
v. }
HERBERT L. DENNIS,
Defendant. }

"To the above-named defendant:

"You are hereby requested to appear in the district court of the fourth judicial district, holding terms at Spokane Falls, within twenty days after the service of this summons, exclusive of day of service if served in the above county; if not served in the above county, but in said district, in thirty days; if served in any other judicial district of said territory, in forty days; and answer the complaint of the above-named plaintiff, now on file in the office of the clerk of said court,

and, unless you so appear and answer, the same will be taken as confessed and the prayer thereof granted.

"Witness my hand and the seal of this court this 28th day of May, 1889.

"[Seal]

HARRY A. CLARK,

"Clerk of said Court,

"By A. S. JOHNSTON,

"Deputy.

"A. K. McBROOM,

"Attorney for Plaintiff.

355 "Territory of Washington, }
County of Spokane. } ss.

"I, E. H. Hinchliff, sheriff of Spokane county, Washington territory, do hereby certify that I served the within summons on the within-named defendant, Herbert L. Dennis, in Spokane county, Washington territory, on the 6th day of June, A. D. 1889, by then and there delivering to said defendant personally a copy of said summons.

"E. H. HINCHLIFF,

"Sheriff of Spokane County, W. T.

"By F. K. PUGH,

"Deputy."

The summons served upon Sarah Dennis, mother of said defendant, is as follows:

"Territory of Washington, }
County of Spokane. } ss.

"In the district court of the territory of Washington, in and for the fourth judicial district thereof, holding terms at Spokane Falls, Spokane county, in said territory.

"HENRY FRENCH,
Plaintiff, }
v. }
HERBERT L. DENNIS,
Defendant. }

"To Sarah Dennis, mother of Herbert L. Dennis:

"You are hereby requested to appear in the district court of the fourth judicial district, holding terms at Spokane Falls, within twenty days after the service of this summons, exclusive of day of service if served in the above county; if not served in the above county, but in said district, in thirty days;

if served in any other judicial district of said territory, in forty days; and answer the complaint of the above-named plaintiff, now on file in the office of the clerk of said court, and, unless you so appear and answer, the same will be taken as confessed and the prayer thereof granted.

"Witness my hand and the seal of this court this 28th day of May, 1889.

"[Seal]

HARRY A. CLARK,

"Clerk of said Court,

"By A. S. JOHNSTON,

"Deputy.

"A. K. McBROOM,

"Attorney for Plaintiff.

356 "Territory of Washington, }
County of Spokane. } ss.

"I, E. H. Hinchliff, sheriff of Spokane county, Washington territory, do hereby certify that I served the within summons on the within-named Sarah Dennis, mother of Herbert L. Dennis, in Spokane county, Washington territory, on the 6th day of June, A. D. 1889, by then and there delivering to said Sarah Dennis personally a copy of said summons.

"E. H. HINCHLIFF,

"Sheriff of Spokane County, W. T.

"By F. K. PUGH,

"Deputy."

It will be noticed that the only difference between the copy served on the minor and the one served on his mother is that the former runs, "To the above-named defendant," while the latter runs, "To Sarah Dennis, mother of Herbert L. Dennis." The statute did not provide a form of summons which must have been followed absolutely, but the form provided should have been substantially followed. It was evidently the intention of the statute that, when a minor was being sued, his parent, guardian, or other person having him in care, should have notice of that fact, so that the interests of the minor might be protected; and the statute makes it imperative that both the infant and the parent or his guardian shall be served, before jurisdiction of the person can be acquired. This summons contained the title and locus of the court; it named the plaintiff and the defendant; it notified the mother that a complaint was on file, that her son was being sued, and that she must appear therein, and that unless she appeared within

a certain time the prayer of the complaint would be granted. We certainly think this summons was sufficient to notify the person served therewith what was meant, and that she must see that her infant appeared in said action and protected his rights, or that she must do so for him. The summons substantially followed the law, was served ³⁵⁷ strictly in accordance with the provisions of the statute upon both the minor and his mother, and was therefore sufficient.

Conceding, however, that the form of the summons was defective, it does not follow that the said judgment was void, because the court was a court of general jurisdiction, and every fact not negatived by the record must be presumed to support the decree: *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; 1 *Freeman on Judgments*, 4th ed., sec. 126; 1 *Black on Judgments*, secs. 170, 223, 263.

The decree recited that service was duly made, and that the property described was the separate property of Sarah Dennis. It must be presumed, in the absence of the record to the contrary, that these facts appeared to the court by competent proof. There is a wide distinction between cases where defective service is had and where no service at all is had, or where the wrong person is served. The case of *Hatch v. Ferguson*, 57 Fed. 966, cited and relied upon by appellant, is of the latter class. There the court found as a fact that one Ferguson, who had been nominated guardian of the infant heirs without bond, "was not the legal guardian of the complainants. Service of the summons in the partition suit upon him was not sufficient to bring them within the jurisdiction of the superior court for Snohomish county, and they are not bound by his appearance as their representative. The sale of their land pursuant to the order of that court is therefore void." In the case before us there is no question that the proper persons were served, but only that the service was void or so defective as to amount to a nullity.

Appellant urges that the complaint in *French v. Dennis* did not state facts sufficient to give the court jurisdiction of the subject matter. After alleging possession, the said complaint further alleges "that the plaintiff claims title in ³⁵⁸ fee to the said premises, and that the said defendant claims an estate or interest therein adverse to the said plaintiff." That action was brought under section 551 of the Code of 1881. Under that section it was sufficient; but, if not sufficient under that section, after judgment reciting proofs that plaintiff

holds title in fee, it could not be attacked in this collateral way: 1 Black on Judgments, sec. 100; Vanfleet on Collateral Attack, secs. 61, 256.

Appellant urges that the decree is void because it recites that the cause came on for hearing before the judge at chambers. There is no merit in this contention. There was no limitation in the organic act, or in any act of Congress upon jurisdiction of territorial courts or the judges thereof, which prevented such court or judge from holding court at any time in his district: See Organic Act, sec. 1865, Code 1881, p. 21; Organic Act, sec. 1874, Code 1881, p. 23; Organic Act, sec. 1917, Code 1881, p. 27. Nor was there any limitation upon the authority of the legislature which rendered invalid section 2138 of the Code of 1881, which reads as follows: "The several judges of the district courts in this territory, and each of them in their respective districts, may, at chambers, in vacation, entertain, try, hear, and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury, and all rulings, orders, judgments, and decrees, made or rendered by a judge of the district court at chambers, may be entered of record, in vacation, and shall have like force and effect as though made or rendered at a regular term of the district court."

The obvious intention of the legislature in the passage of that section of the law was, as stated in *Murne v. Schwabacher*, 2 Wash. Ter. 130, 3 Pac. 899: "To have all the courts in each district open at all times for the transaction of certain specified business."

Appellant urges that the court erred in refusing to allow ³⁵⁹ evidence in support of the reply. The reply alleges, in substance, that in May, 1889, a pretended action was commenced in the district court of Washington territory, wherein Henry French was plaintiff and Herbert L. Dennis, a minor, was defendant; that said complaint filed therein did not state facts sufficient to constitute a cause of action, and that no legal service of summons was ever had in said action; but subsequently the court, without having jurisdiction of the subject matter of the action, or of the person of the said defendant, pretended to appoint a guardian ad litem in said action for said defendant; that subsequently the judge of said court pretended to determine said cause at chambers, and rendered a pretended decree against defendant; that no notice of the time and place of said hearing was given to said guardian, and

said guardian had no notice thereof and was not present, and said cause was not tried upon the merits; that said defendant had a good and valid defense to said action, which defense was unknown to said guardian, and was not set forth in said action; that at the time of said action said defendant was the owner in fee of an undivided one-half of said property; that defendant was, and still is, a minor, and that defendants in this action had full knowledge of all the facts hereinbefore set forth. Conceding that plaintiff in this action could introduce evidence dehors the record in the said cause of *French v. Dennis* to show want of jurisdiction of the subject matter of the action, and of the person of the defendant, no such evidence was offered, other than that hereinbefore considered. Plaintiff, however, did offer to show that after service, and after the appointment of a guardian ad litem, and after answer of the said guardian, no notice of the time or place of trial was given to the said guardian. While this evidence, if true, might be considered as proof of irregularity or proof ³⁶⁰ of fraud practiced by the successful party, and therefore admissible in a direct attack upon the judgment to set it aside under the statute, it would not be competent to oust a court of jurisdiction once acquired, and would not be evidence of a void judgment, and was therefore properly excluded: *Black on Judgments*, sec. 245; 1 *Freeman on Judgments*, 4th ed., sec. 135; *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050.

No error appearing in the record, the judgment of the lower court will be affirmed.

Reavis, C. J., and Dunbar, Fullerton, Anders, White, and Hadley, JJ., concur.

If Process is Served on an Infant personally, it has been held that the failure to also serve it upon his father, mother, or guardian is a mere defect in the service, insufficient to deprive the court of jurisdiction to proceed with the action; See the monographic note to *Sanford v. Edwards*, 61 Am. St. Rep. 492. Consult, in this connection, *Westmeyer v. Gallenkamp*, 154 Mo. 28, 77 Am. St. Rep. 747, 55 S. W. 231; *Robertson v. Blair*, 56 S. C. 96, 76 Am. St. Rep. 543, 34 S. E. 11; *Cowling v. Hill*, 69 Ark. 350, 86 Am. St. Rep. 200, 62 S. W. 800.

Collateral Attack upon Judgments is considered in the monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 104-119. An irregularity in the form of the summons does not make a judgment vulnerable to collateral attack: *Perry v. Gholson*, 39 Or. 438, ante, p. 685, 65 Pac. 601. As against collateral attack on the ground that the summons was insufficient, it will be presumed that another and sufficient summons was issued and served: *Rogers v. Miller*, 13 Wash. 82, 52 Am. St. Rep. 20, 42 Pac. 525; *Bradley v. Doone*, 187 Ill. 175, 79 Am. St. Rep. 214, 58 N. E. 304.

NORTHERN PACIFIC RAILWAY COMPANY v. ELY.

[25 Wash. 384, 65 Pac. 555.]

ADVERSE POSSESSION—OCCUPATION OF RAILROAD RIGHT OF WAY.—Adverse possession of a portion of a railroad right of way, inconsistent with its use as such, maintained for the statutory period of limitation, confers title on the occupant, and bars the right of the railroad company to recover possession. (pp. 768, 770.)

ADVERSE POSSESSION OF RAILROAD RIGHT OF WAY—ESTOPPEL.—If a railroad company permits portions of its right of way to be occupied by settlers, under pre-emption and homestead laws, without objection, for more than ten years, and such occupants plat the land into city lots, make valuable improvements thereon, and expend vast sums of money for taxes and street assessments, the company is estopped from asserting title to such portions of its right of way. (pp. 767, 770.)

ADVERSE POSSESSION OF RAILROAD RIGHT OF WAY—DEFENSE OF PUBLIC POLICY.—If a railroad permits another to occupy its right of way until his title becomes perfect by adverse possession, the company cannot set up the defense that its right of way was granted for public purposes, and that it is against public policy to permit the abandonment of the right of way, as such, or the acquisition of title thereto either by adverse possession or by way of estoppel against the company. (pp. 768, 773.)

Stephens & Bunn, C. W. Bunn, and James B. Kerr, for the appellant.

F. T. Post, S. R. Stern, F. W. Dewart, J. Dawson, Henley, Kellam & Lindsley, and J. Rosslow, for the respondents.

385 DUNBAR, J. This action was brought by the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, to recover possession of certain portions of its right of way in the county of Spokane. The complaint alleges that the plaintiff was the owner and entitled to the possession of a strip of land four hundred feet wide, and that defendants had wrongfully entered thereon, and judgment was demanded for the removal of a cloud, for the quieting of title to the lands mentioned in the complaint, and for the possession of same. Separate answers were interposed by many of the defendants, separate trials had, and separate verdicts rendered. A single judgment, however, was rendered, determining all the issues in the case.

It may be conceded, we think, that the right of way which embraces the land in dispute was granted to the Northern Pacific Railroad Company by act of Congress in 1864, and that, to the title to the right of way thus granted to the Northern

Pacific Railroad Company, the Northern Pacific Railway Company has succeeded. It may also be conceded, for the purposes of this case, that the Northern Pacific Railway Company has complied with all the terms and provisions of the act of Congress aforesaid, and has constructed its railroad through the whole of the line of road between the points named in the granting act; that a map of definite location was filed October 4, 1880, prior to the acquiring of the title to the land in question by the defendants or their predecessors or grantors; and that said railroad has been continuously operated since its construction. The defendants, answering, claim title by patent from the United States government. The land was acquired under the pre-emption and homestead acts, respectively, and all the defendants or their grantors have been ³⁸⁶ in quiet, peaceful, undisturbed, and undisputed possession of said land for more than ten years immediately prior to the commencement of this action, many of them for nearly twenty years. Valuable improvements have been made by the defendants, the said land consisting of town lots in the city of Spokane, and having been platted and laid out as additions to the city of Spokane by the defendants or their grantors after acquiring title to the same from the United States government. During all these years no claim whatever to these lands has been made by the appellant. It has stood by and seen improvements made thereon, and, in the case of defendant Brown, an agreement was entered into between him and General Sprague, who was then the general superintendent of the Northern Pacific Railroad Company, that they would plat their lots so that the streets of the addition which the railroad company was dedicating would correspond with and meet the streets which Brown was dedicating to the city of Spokane, and the agreement was carried out by arranging the streets in accordance therewith. These streets have been used by the public for from ten to eighteen years. The testimony shows that, in addition to the improvements which these defendants have made upon their lots, many thousands of dollars have been paid by them for assessments levied upon abutting land for the improvement of streets running through this right of way; that the appellant has never paid these assessments; that they have never been assessed to the appellant; and that no question has ever been raised by the appellant as to the right and obligation of the defendants to pay the same. While the record does not show that any of the lands owned by the

defendants were deeded to them by the appellant, it does show that the Northern Pacific Railroad Company has deeded to other parties lots in the city of Spokane situated within the four hundred feet of right of way, upon which valuable improvements have been made by its grantees.

³⁸⁷ The questions involved in this case are: 1. Adverse possession of respondents; 2. That the action was barred by the statute of limitations; 3. Equitable estoppel by the laches and misconduct of appellant. The questions of fact were put in issue by the pleadings, were submitted to a jury and found in favor of the several defendants, and the court upon said findings entered its decree declaring the title of said lands to be in the defendants. Under our statute, the right to commence an action of this kind is barred after ten years' possession on the part of the defendants, and it may be conceded that the bar is effectual in this case if the statute of limitations runs against the appellant. It is contended by the appellant that it does not, and there is considerable discussion on the proposition of whether the interest of the company in this right of way is merely an easement, or whether it is possessed of a fee simple title. As we view the law, however, these questions are immaterial; for, if the statute runs in one instance, it would in the other. It is the contention of the appellant that the statute does not run against it for the reason that the right of way is granted in the interest of the public, and that it would be against public policy to allow the company to alienate its right of way, thereby depriving it of the power to carry on the business in aid of which the franchise was granted, and that it must necessarily follow that, if the company could not alienate its lands, public policy would equally prevent an alienation through process of law; that the statute of limitations presupposes a grant by the true owner; and the appellant's predecessor having been the true owner, and the title to the land having been acquired by the defendants subsequent to the acquiring of title by the appellant, that no grant by the true owner had ever been made, and, consequently, that the statute of limitations did not apply. The statute of limitations, we think, is not ³⁸⁸ based upon such a thought, but is purely and essentially a statute of repose, in the interest of the stability of titles and of good morals. One holding land adversely to the rights of another can be divested only by the action of the other, even with a better right, within the time prescribed by the statute of limitations, and

this is true, even though he may have originally entered under a void grant or sale. But his claim ripens into a perfect title and becomes absolute, if such possession is not disturbed within the time prescribed. As is said by 3 Washburn on Real Property, fifth edition, page 176: "The operation of the statute takes away the title of the real owner and transfers it, not in form, indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly, because it seems to be the result of modern decisions, although it was once held that the effect of the statute was merely to take away the remedy, and did not bind the estate, or transfer the title."

That the statute of limitations is a statute of repose has been decided by all modern authority, including many decisions from this court: See *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055. There are no exceptions under our statute, and it must apply to the case at bar, unless the appellant's right to commence the action is guaranteed by some higher authority. The statute is as follows:

"Sec. 4796. Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued.

"Sec. 4797. Within ten years—1. Actions for the recovery of real property, or for the recovery or possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of this action."

389 It will be observed that this case does not involve in any manner a construction of the act of Congress incorporating the Northern Pacific Railroad Company, or the granting to the company of its right of way. Neither is this an action against the company, as many of the actions are which are cited by the appellant. There is no attempt here to bind the company by an ultra vires agreement, but the attempt is on the part of the company to repudiate executed contracts and rights which have grown up through the laches, negligence, and direct agreements of the company. Neither is this an action where the court has attempted to determine how much of the right of way was necessary for the railway company to use in operating its road, but it was a determination of the fact of how much of the right of way the railroad company had abandoned, and how much of the right of way, according to its

own determination, it did not need for the purpose of operating its road, and how much it could abandon without defeating the purpose for which the grant was made. Of the cases cited by appellant, the strongest one favoring its contention, and the only one, therefore, which it is necessary for us to notice, is *Northern Pac. R. R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. Rep. 794; and it is claimed by the appellant that in this case the rule was clearly announced that the company could not abandon any portion of its right of way. There are some expressions used by the court in this case which give plausibility to appellant's contention, but there are so many different propositions involved in the case that it is hard to tell upon what exact proposition the case was decided. Great stress seems to have been placed by the court upon the defect in Smith's deed, and an examination of the cases cited by the court shows that the exact question raised in this case was not involved or considered seriously in that, although it was decided in that case that ³⁹⁰ the court had no right to determine the question of how many feet had been used and occupied for railroad purposes by the company, and that it was entitled to the number of feet that were granted to it by the government. The concluding remark of the court is as follows: "The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any rate, a forfeiture for misuser could not be enforced in a private action"—a proposition which certainly cannot be controverted. But in that case the company was in possession of the lands sought to be obtained by Smith, the allegation being that it had been, more than six years prior to the commencement of the action, in possession of the premises. So that no question of adverse possession and user or of the statute of limitations was involved, and we do not think that the supreme court of the United States, notwithstanding some expressions which are made in this case and which were not necessary for its determination, would, under the circumstances of this case, deprive these defendants of their homes and property where a title had been obtained through the government, and where, by consent, agreement, and acquiescence of the company, time and money had been expended in their improvement during all these years of quiet and undisputed possession. If the doctrine of estoppel can ever be invoked, it seems to us that

it should be invoked in this case against the appellant. In any event, the question of protecting the rights of the government is not one which can be raised by the appellant. If the rights of the government are in any way involved or jeopardized by the possession of these lands by the defendants, the government may act in the premises unaided by the appellant, whose negligence and laches have been ³⁹¹ the cause of these investments by the defendants. The appellant should not be allowed to escape the consequences of its own wrongful acts, and reap a fraudulent benefit, by pleading the rights of the government. Indeed, our government is presumably founded upon equitable principles, not in theory alone, but in practice, and the citizen has a right to expect equitable treatment, even at the hands of the government; and it has been held that in good conscience the government is frequently estopped from asserting rights which would destroy the equitable rights of the citizen. In *State ex rel. Attorney General v. Janesville Water Power Co.*, 92 Wis. 496, 66 N. W. 512, it was held that leave would not be granted to the state to institute an action to forfeit the franchises of a solvent, active corporation, carrying out the purposes of its creation in supplying the necessities of a large number of people, whose securities are held by innocent persons, in the absence of a clear willful misuse, abuse, or non-use of its franchises. In that case the court quotes from *Commonwealth v. Baltimore etc. Turnpike Co.*, 153 Pa. St. 47, 25 Atl. 1105, where the court held that, in case of delay accompanied by circumstances which would estop individuals, the state was equally estopped. There the circumstances showed that a corporation had been allowed to proceed and expend large sums of money when the facts relied upon in the application for leave to bring the action to forfeit the franchises were notorious. Held, that the delay, under the circumstances, created an estoppel so as to effectually prevent the institution of such proceedings. The court, in effect, said: If the complainant were a private individual, the court would not hesitate to say that his laches were a bar; and the same rule holds good notwithstanding the application is by the attorney general on behalf of the state. The question involved is not one under ³⁹² the statute of limitations, but one of laches, which may be imputed to the state as well as to an individual. While time does not run against the state, time, together with other elements, may make up a species of

fraud, and estop even sovereignty from exercising its legal rights: Citing *Willmott v. Barber*, L. R. 15 Ch. Div. 105; *Attorney General v. Johnson*, 2 Wils. Ch. 102; *Attorney General v. Delaware etc. B. R. Co.*, 27 N. J. Eq. 1. The court, concluding, said: "The principles here maintained should be quite rigidly applied, where, as in this case, the corporation has not merely been allowed, but has been compelled, by those chiefly interested and the real moving parties, to proceed at great expense, under the franchises sought to be annulled, for a considerable period of time, while the facts relied upon as grounds for forfeiture have been all well known."

This language might be appropriately applied to the facts in this case, and could as well be applied to the individual defendants here as to corporate defendants there; for these defendants have not only been allowed to possess these lots, but the title to them has been conveyed to them by the government of the United States after a compliance on their part with the requirements of the law in relation to pre-emption and homestead claims, and after, in addition to the expense and time necessarily involved in obtaining title under these acts from the government, the expenditure of many thousands of dollars in creating permanent improvements on these lands, and in paying many thousands of dollars assessments for the improvement of streets, in addition to other taxes for the benefit of the government, with the knowledge and acquiescence, and in some cases the actual agreement, of the appellant. It is also held in *Commonwealth v. Baltimore etc. Turnpike Co.*, 153 Pa. St. 47, 27 Atl. 1105, that where a turnpike company is allowed, without objection, ³⁹³ to expend a large amount of money in extending its road, under authority of and a decree of court, a commonwealth is estopped to question the regularity of the proceedings under which such authority was granted. There again the court said: "In England, from whence we derived the great body of common law, and most of our principles in equity, it is well settled that while time will not run against the crown, yet time, together with other elements, may make up a species of fraud and estop even sovereignty from exercising its legal rights"—citing *Attorney General v. Johnson*, 2 Wils. Ch. 102, where there was an attempt on behalf of the crown to restrain a purpresture in the river Thames, and the court refused to entertain the bill because of the delay on the part of the attorney general in instituting the proceeding. Citing, also, *Attorney General v. Sheffield Gas Consumers Co.*, 3 De Gex, M. & G. 304. See, also, *Attorney General v. Delaware etc. R. R. Co.*, 27 N. J. Eq. 631.

As showing that the rule that the company cannot alienate any part of its right of way is not to be literally construed it has been decided that a railroad company to which Congress has granted a right of way across the public lands and sections of lands adjoining such right of way, in aid of the construction of its road, has power to dedicate to the public the right to cross its tracks and right of way: *Northern Pac. R. R. Co. v. Spokane*, 64 Fed. 506, 12 C. C. A. 246.

On the proposition that, when a corporation has made contracts in violation of its powers, the validity of such contracts can be questioned only by the government, see *National Bank v. Matthews*, 98 U. S. 621.

No case is cited by the appellant which holds that a railway company may not lose a part of its right of way by adverse possession, by abandonment or estoppel, and we do ³⁹⁴ not think that any case can be found which advances those propositions, but many courts have held the reverse. In *Pittsburgh etc. Ry. Co. v. Stickley*, 155 Ind. 312, 58 N. E. 193, it was held by the supreme court of Indiana that adverse possession, acquiesced in by the company for the statutory period, prevented a recovery, and we cannot do better than insert a portion of the opinion of the court in that case:

"Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders. The cases holding that the statute of limitations affords no defense to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. Railroad officers are not governmental agents whose laches creates no bar. It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists. . . . If a company voluntarily disable itself to perform its duties to the public, its charter may be forfeited. But there is no reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation. It is true that the statute en-

titles a railway company to take land in fee and forbids interference with the company's exclusive use. But the right to the exclusive use (which is an incident to every unqualified ownership) must be asserted. If one occupies adversely for twenty years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain as a private proprietor. The state confers ³⁹⁵ the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the state should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents": Citing *Illinois etc. R. R. Co. v. Houghton*, 126 Ill. 233, 9 Am. St. Rep. 581, 18 N. E. 301; *Illinois etc. R. R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563; *Illinois etc. R. R. Co. v. Moore*, 160 Ill. 9, 43 N. E. 364; *Donahue v. Illinois etc. R. R. Co.*, 165 Ill. 640, 46 N. E. 714; *Illinois etc. R. R. Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Matthews v. Lake Shore etc. Ry. Co.*, 110 Mich. 170, 64 Am. St. Rep. 336, 67 N. W. 1111; *Bobbett v. South Eastern Ry. Co.*, L. R. 9 Q. B. Div. 424; *Norton v. London etc. Ry. Co.*, L. R. 13 Ch. Div. 268; *Erie etc. Ry. Co. v. Rousseau*, 17 Ont. App. 483.

In *Matthews v. Lake Shore etc. Ry. Co.*, 110 Mich. 170, 64 Am. St. Rep. 336, 67 N. E. 1111, it was held that, after a right to use land as part of its right of way had been granted to a railroad company and such company fenced its right of way excluding such land, and thereafter the grantor conveyed the land to the plaintiff, who inclosed the same and used it for crops and pasturage, openly and continuously, without the assent of the company, for more than fifteen years, the plaintiff acquired title by adverse possession. To the same effect are numerous other cases. In fact, it seems to be the universal authority.

The case of *Northern Counties etc. Trust, Ltd., v. Enyard*, 24 Wash. 366, 64 Pac. 516, cited in appellant's reply brief in support of the position that possession for more than the statutory time on a railroad right of way was not adverse, but permissive, shows, on examination, that the circumstances surrounding it were altogether different from the circumstances surrounding the case at bar. Under the circumstances of that case it was held that the occupancy of a portion of the right ³⁹⁶ of way of the railroad company by the owner of a servient estate was not inconsistent with the easement, the occupation there being for the purposes of farming the land embraced in the right of way. We do not

desire to extend the rule enunciated in that case. But, whether or not the facts in that case warranted the conclusion reached by the court, certainly the circumstances shown by the record in this case will not justify the conclusion reached in that, that the occupancy of the defendants, taken in connection with the improvements and the use to which the improvements were put, was not inconsistent with the appellant's right to use the same for railroad purposes.

In consideration of all the circumstances surrounding this case, and of the underlying principles governing rights and remedies, we are of the opinion that the judgment should be affirmed.

Reavis, C. J., and Fullerton, Mount, Anders, Hadley, and White, JJ., concur.

THE RIGHT TO ACQUIRE TITLE BY ADVERSE POSSESSION TO LANDS DEVOTED TO A PUBLIC USE.*

I. Lands Held by Municipal or Other Public Corporations.

a. Streets and Highways.

1. Rights of the Public Therein.

2. Rights of Private Persons.

b. Other Public Uses.

c. Applicability of Doctrine of Equitable Estoppel.

II. Lands Held by Railway or Other Quasi Public Corporations.

I. Lands Held by Municipal or Other Public Corporations.

a. Streets and Highways.

1. Rights of the Public Therein.—The right to acquire title by adverse possession to lands held by a municipality, county or other governmental agency, and dedicated or devoted to a public use, has been considered at some length in the monographic notes to *Orr v. O'Brien*, 14 Am. St. Rep. 278-282, and to *Schneider v. Hutchinson*, 76 Am. St. Rep. 479-495. The question has most frequently arisen in cases where the adverse possession of a public street or highway is involved, and with reference to the law applicable in such cases the authorities are by no means in complete harmony.

In a number of states it is held that the rights of the public in a street or highway may be divested by the adverse posses-

*REFERENCES TO MONOGRAPHIC NOTES.

Adverse possession of public property: 76 Am. St. Rep. 479-485.

Adverse possession: 28 Am. St. Rep. 158-162.

Extinguishment of highways and other easements through nonuser or the operation of the statute of limitations: 14 Am. St. Rep. 278-282.

Adverse possession as between husband and wife: 18 Am. St. Rep. 113-115.

Mistake and ignorance respecting boundary lines as affecting adverse possession: 24 Am. St. Rep. 388-390.

What entry by the owner will terminate adverse possession: 83 Am. Dec. 497-500.

sion of another for the statutory period. In these states there is deemed to be no greater reason for exempting lands held by a municipality and dedicated to a public use from the operation of the statute of limitations than exists in the case of any other property by whomever held. By these authorities the maxim, "Nullum tempus occurrit regi," is confined entirely to cases where the state itself is a party, and is deemed wholly inapplicable to municipal corporations. Such is the doctrine of the courts of Arkansas, Kentucky, Michigan, Minnesota, Texas and Vermont: See *Fort Smith v. McKibben*, 41 Ark. 45, 48 Am. Rep. 19; *Dudley v. Frankfort*, 51 Ky. 610; *Aloes v. Henderson*, 55 Ky. 131; *Bosworth v. City of Mt. Sterling*, 12 Ky. L. Rep. 157, 13 S. W. 920; *Hegan v. Pendeemis Club*, 23 Ky. Law Rep. 861, 64 S. W. 464; *Gregory v. Knight*, 50 Mich. 61, 14 N. W. 700; *Vier v. City of Detroit*, 111 Mich. 646, 70 N. W. 139; *Darrow v. Village of Homer*, 122 Mich. 229, 81 N. W. 262; *St. Paul etc. Ry. Co. v. Minneapolis*, 45 Minn. 400, 48 N. W. 22; *City of Hastings v. Gillett* (Minn., Jan. 1902), 88 N. W. 987; *City of Galveston v. Menard*, 23 Tex. 349; *Ostrom v. San Antonio*, 77 Tex. 345, 14 S. W. 66; *Knight v. Heaton*, 22 Vt. 480.

The overwhelming weight of authority is, however, in favor of the contrary and the better doctrine, even where the statute of limitations is expressly made applicable to actions brought by the state. "The state," says the supreme court of West Virginia in *Ralston v. Town of Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326, "in its governmental capacity has no right to alien or authorize the alienation of the public highways except for the public good; but it may provide subagencies to control, make, repair, and otherwise exercise complete supervision over such highways; and make such agencies responsible for the good condition thereof through their servants. . . . But such agencies have no right to sell, alien, or dispose of such highways in any manner except as provided by statute. Nor can any individual destroy the public easement in such highway by any act of his own. It is a new quality given to land, when dedicated to the use of the public as a highway. And it is one that an individual can neither acquire nor enjoy by himself. When land ceases to be a highway, this quality no longer attaches to it, but it is utterly destroyed or becomes extinct. It belongs to the public, and not to the state, county, or municipality that may in their governmental capacities, under their police and administrative powers, regulate and control it in such manner as will conduce to the public welfare, and may destroy it if in accord with the sovereign will of the people, but not otherwise. If the easement is destroyed by the proper agency of the people, the title is revived, and the land reverts to the owner of the fee, whether it be the municipality, the abutting owner, or the original owner who first dedicated it to the public use. If the easement is interfered with by an individual while it is alive, such interference is a public nuisance, and it matters not how long it is continued, it can never destroy the easement; for it is under the ban of the law, and subject

to abatement at any time. A nuisance can never oust the public easement, no more than an individual can take away the sovereignty of the people. He may forfeit his rights and property to them, but they can never, in a popular government, forfeit their sovereignty to him. He may cease to be a part thereof, but cannot enjoy more than his equal share therein. His nuisance must yield to their sovereignty whenever they see fit through their proper agencies to exercise it. Once a nuisance, always a nuisance; once a highway, always a highway, until legally discontinued, changed, or altered." This undoubtedly represents the true rule, and it is well settled in the great majority of states that no obstruction or adverse possession of any land devoted to public use as a highway can ever ripen into or give rise to a title to such lands. Every such obstruction is a public nuisance which no lapse of time can legalize. Public rights of this nature, it is held, cannot be barred by any statute of limitations which does not in the clearest terms include them. For cases supporting this doctrine see the following: *Harn v. Council of Dadeville*, 100 Ala. 199, 14 South. 9; *Mills v. Los Angeles*, 90 Cal. 522, 27 Pac. 354; *Orena v. City of Santa Barbara*, 91 Cal. 621, 28 Pac. 268; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 50 Pac. 277; *Derby v. Alling*, 40 Conn. 410; *City of De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036; *Brooks v. Riding*, 46 Ind. 15; *Sims v. Frankfort*, 79 Ind. 446; *Wolfe v. Town of Sullivan*, 133 Ind. 331, 32 N. E. 1017; *Davies v. Huebner*, 45 Iowa, 574; *Webb v. Butler County*, 52 Kan. 375, 34 Pac. 973; *Handlin v. Weston Lumber Co.*, 47 La. Ann. 401, 16 South. 955; *St. Louis v. Missouri Pac. Ry. Co.*, 114 Mo. 13, 21 S. W. 202; *Territory v. Deegan*, 3 Mont. 82; *Cross v. Morristown*, 18 N. J. Eq. 305; *Hoboken Land etc. Co. v. Hoboken*, 36 N. J. L. 540; *Little Miami R. Co. v. Greene County Commrs.*, 31 Ohio St. 338; *Almy v. Church*, 18 R. I. 182, 26 Atl. 58; *Chafee v. City of Aiken*, 57 S. C. 507, 35 S. E. 800; *Depriest v. Jones (Va.)*, 21 S. E. 478; *Town of Weston v. Ralston*, 48 W. Va. 170, 36 S. E. 446; *Nicolai v. Davis*, 91 Wis. 370, 64 N. W. 1001, and numerous cases cited in 76 Am. St. Rep. 494, and 14 Am. St. Rep. 278, 279.

In Nebraska it is held that the title to land devoted to public use as a street may be acquired by adverse possession: *Meyer v. City of Lincoln*, 33 Neb. 566, 29 Am. St. Rep. 500, 50 N. W. 763; *Webster v. City of Lincoln*, 56 Neb. 502, 76 N. W. 1076. This holding may nevertheless be justified by the fact that the statutes of that state give to municipal corporations a proprietary interest in streets, and the right to sell or otherwise dispose of them, although the cases originally establishing the rule did not place it upon this ground. In *Krueger v. Jenkins*, 59 Neb. 641, 81 N. W. 844, however, the court lays this down as the basis of the doctrine, and holds that as to highways not belonging to a municipality, and hence not governed by the statute, the rule in Nebraska is that supported both by reason and by the weight of authority, and the right of the public to use such highways cannot be barred by any adverse pos-

session on the part of an individual: *Krueger v. Jenkins*, 59 Neb. 64, 81 N. W. 844; *Lydick v. State*, 61 Neb. 309, 85 N. W. 70.

In *Peckham v. Henderson*, 27 Barb. 207, a distinction is attempted between that which is merely an encroachment on a public highway and which does not amount to an obstruction of it, and that which actually obstructs the highway: See, also, *Evans v. Cincinnati*, 2 Handy, 236. According to that case an encroachment which does not amount to an obstruction of a highway is not a public nuisance, and may therefore be legalized by lapse of time and adverse possession. This distinction is not, however, generally followed, and the rule now established in nearly all of the states renders it impossible to acquire title to any part of a highway by adverse possession, no matter how trivial the encroachment. Indeed, it has been held that no possession of a portion of a street can be said to be adverse to the right of the public until the public finds it necessary or sees fit to use that portion of the highway. In other words, according to this latter view, there can be no possession adverse to the public of any encroachment which does not actually obstruct the public use of the highway: *Reilly v. City of Racine*, 51 Wis. 526, 8 N. W. 417; *Childs v. Nelson*, 69 Wis. 125, 33 N. W. 587.

2. **Rights of Private Persons.**—The fact that certain land has been dedicated or devoted to a public use, as for a street or highway, does not affect the right to acquire title by adverse possession to any private rights in such land. Such private rights are no more exempt from the statute of limitations than is any other private property. Thus the owner of the fee of the land on which there is a public highway may be barred of his title thereto by the adverse possession of another for the statutory period. And it is entirely immaterial that the possession of the land by that other amounted to a public nuisance during the entire period of its continuance, and as such might have been summarily abated at any time: *Read v. Leeds*, 19 Conn. 182; *Cody v. Fitzsimmons*, 50 Conn. 209. Likewise the private rights of an abutting owner in the highway on which his land abuts may be lost by adverse possession on the part of another: *Woodruff v. Paddock*, 130 N. Y. 618, 29 N. E. 1021; *Lambert v. Huber*, 22 Misc. Rep. 462, 50 N. Y. Supp. 793. See, also, *Corwin v. Corwin*, 24 Hun, 147.

b. **Other Public Uses.**—With reference to lands devoted to public uses other than those covered by streets or highway, a distinction has been attempted between land devoted to a use which is strictly public and that devoted to the use of the inhabitants of a particular city or county. Thus, land dedicated to a county for use as a market was held in *Callaway County v. Nolley*, 31 Mo. 393, to be dedicated not to a "public use," but to the use of the inhabitants of a certain town only, and their rights, it was held, might therefore be barred by adverse possession for the statutory period. In *Mowry v. City of Providence*, 10 R. I. 52, the same distinction was applied to land set apart for a cemetery, and it was

held that this was a dedication "not for the whole public, but for a limited portion of the public, and that the doctrine of adverse possession will apply to it." In *City of Wheeling v. Campbell*, 12 W. Va. 36, however, the distinction meets with strong disapproval, and is said not to be "founded in good reason." Certain it is that it has not been generally followed.

Thus it has been held that land devoted to use as a cemetery is land devoted to a public use, the public rights in which cannot be divested by the adverse occupation of an individual: *Commonwealth v. Viall*, 84 Mass. 512. And a fire-engine lot, which would seem to be a very strong instance of land devoted to a use beneficial only to the inhabitants of a town, and not to the public generally, has been held to be dedicated to a public use and not a subject of adverse possession: *San Francisco v. Bradbury*, 92 Cal. 414, 28 Pac. 803. And this doctrine has been applied to a school lot in *Board of Education v. Martin*, 92 Cal. 209, 28 Pac. 799; to a hospital lot: *Yolo County v. Barney*, 79 Cal. 375, 12 Am. St. Rep. 152, 21 Pac. 833; *Home for Inebriates v. City and County of San Francisco*, 119 Cal. 534, 51 Pac. 950; to public squares: *Hoadley v. City of San Francisco*, 50 Cal. 265, reaffirmed in 70 Cal. 320, 12 Pac. 125; *Town of San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *People v. Holladay*, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54; *Lee v. Town of Mound Station*, 118 Ill. 304, 8 N. E. 759; *Kittaning Academy v. Brown*, 41 Pa. St. 269; *Philadelphia v. Philadelphia Ry. Co.*, 58 Pa. St. 253; *Grogan v. Town of Hayward*, 4 Fed. 161. See, however, *Pella v. Schoete*, 24 Iowa, 283, 95 Am. Dec. 729.

In those states, however, the courts of which permit public rights in streets and highways to be barred by adverse possession (see *supra*, p. 777), the same rule is applied to lands devoted to other public uses. Thus it is held in Minnesota that a public levee may be acquired by adverse possession: *St. Paul v. Chicago etc. Ry. Co.*, 45 Minn. 387, 48 N. W. 17; and in Kentucky the rights of the public in a landing or slip devoted to its use have been held to be divested by the occupation of an individual, adverse to the public, and continuing for the statutory period: *Rowan v. Portland*, 47 Ky. 232. See, also, *Nichols v. Boston*, 98 Mass. 39, 93 Am. Dec. 132, and *contra*, *Alton v. Illinois Transp. Co.*, 12 Ill. 38, 52 Am. Dec. 479.

c. **Applicability of Doctrine of Equitable Estoppel.**—In a number of the states in which the salutary rule that no adverse possession can bar the rights of the public in lands devoted to its use is adhered to by the courts, the practical efficacy of this doctrine has been greatly weakened by the application of the doctrine of equitable estoppel to a state of facts to which it is not properly applicable. Much, if not all, of this confusion has arisen from the language employed in a passage in 2 Dillon on Municipal Corporations, third edition, section 675 (quoted at length in note to *Orr v. O'Brien*, 14 Am. St. Rep. 278-282), in which the learned author, after laying down the correct rule that adverse possession is no bar to the assertion of public rights or easements, says: "It will perhaps be

found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public. . . . The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel in pais as applicable to such cases, as this leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require." Regarding this language it is said in *Ralston v. Town of Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326: "In this the rights of the people are confounded with the rights of the municipality. How can equitable estoppel, any more than the statute of limitations, deprive a sovereign of his rights and permit his subjects to destroy them by their wrongful conduct? The use of their highways is a sovereign right, common to all the people, and of which they cannot be divested except in accordance with their will and appointment for the public weal. . . . The statute of limitations is a mere legal estoppel, and if not applying to legalize a public nuisance, neither does equitable estoppel; for equity follows the law, and will grant no relief to a law-breaker or wrongdoer. Clean hands and a clear title are always equitable requirements." Moreover, equitable estoppel can never operate where the fact which it is sought to estop one party from denying was equally known or equally open to the knowledge of both parties: *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289; *Town of San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405; *Wolfe v. Town of Sullivan*, 133 Ind. 331, 32 N. E. 1017; *Carolina Central R. Co. v. McGaskell*, 94 N. C. 746; *Almy v. Church*, 18 R. I. 182, 26 Atl. 58; *Ralston v. Town of Weston*, 46 W. Va. 544, 76 Am. St. Rep. 834, 33 S. E. 326. Many states have, however, followed Dillon in this regard and influenced undoubtedly by the apparent injustice of depriving individuals of property which they have occupied for years, aided by the negligence and laches of public officials and of the public courts, have applied the doctrine of equitable estoppel to such cases: *Chicago etc. R. R. Co. v. City of Joliet*, 79 Ill. 25; *County of Platt v. Goodell*, 97 Ill. 84; *Lee v. Town of Mound Station*, 118 Ill. 304, 8 N. E. 759; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191; *City of Sullivan v. Tichenor*, 179 Ill. 97, 53 N. E. 561; *City of De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036; *Brooks v. Riding*, 46 Ind. 15; *Davies v. Huebner*, 45 Iowa, 574; *Uptagrafft v. Smith*, 106 Iowa, 385, 76 N. W. 733; *Vicksburgh v. Marshall*, 59 Miss. 563; *Evans v. Cincinnati*, 2 Handy, 236; *Simplot v. Chicago etc. Ry. Co.*, 16 Fed. 350.

II. Lands Held by Railway or Other Quasi Public Corporations.

In *Southern Pac. Ry. Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, it is held that the right of way of a railroad is land devoted to a public use, and that no title thereto can be acquired by an adverse pos-

session. The court, after citing cases to the effect that a railroad is a public highway, applies to it the rule that no adverse title can be acquired as against the public in a street or other public highway. In *Collett v. Board of Commrs. of Vanderburgh*, 119 Ind. 27, 21 N. E. 329, it is likewise said by the court that a canal owned by a corporation was land devoted to a public use, title to which could not be lost by the adverse possession of an individual, so long as it remained devoted to the use of the public. Here, however, the canal had been partially built by the state and had then been turned over by it to a corporation to complete and manage it for the benefit of the public. Moreover, the corporation had, in the Indiana case, abandoned the public use and renounced its obligation to the public, the canal had lost its character as a public highway, and the language of the court with reference to a supposed case in which a public highway is involved, is obviously an obiter dictum.

With these two exceptions, however, the authorities seem a unit in holding that land held by a quasi public corporation and devoted to a "public use" is a proper subject for the application of the doctrine of adverse possession. Thus it has been held that land held by a turnpike company and forming a part of its road may be acquired by adverse possession for the statutory period: *District of Columbia v. Krause*, 11 App. Cas. (Dist. of Col.) 398. And while it is perhaps true that there can be no adverse possession of that portion of a railroad right of way which is covered by the track or buildings, or is in use by the railroad, this is so, not because of any public use to which it is devoted, but because "the presence of a track constantly in use is a definite badge of ownership, and the only practical assertion of title that can be made": *Jones on Easements*, sec. 281. If, however, an individual has, for the statutory period, enjoyed a possession of a portion of a railroad right of way, adverse to the title of the railroad company, by the great weight of authority, title will vest in him to the exclusion of the corporation: *Illinois Cent. R. R. Co. v. Houghton*, 126 Ill. 233, 9 Am. St. Rep. 581, 18 N. E. 301; *Illinois Cent. R. R. Co. v. O'Connor*, 154 Ill. 550, 39 N. E. 563; *Illinois Cent. R. R. Co. v. Moore*, 160 Ill. 9, 43 N. E. 364; *Donahue v. Illinois Cent. R. R. Co.*, 165 Ill. 640, 46 N. E. 714; *Illinois Central R. R. Co. v. Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Pittsburgh etc. Ry. Co. v. Stickley*, 155 Ind. 312, 58 N. E. 192; *Pollock v. Marysville etc. R. R. Co.*, 103 Ky. 84, 44 S. W. 359; *Matthews v. Lake Shore etc. Ry. Co.*, 110 Mich. 170, 64 Am. St. Rep. 336, 67 N. W. 111; *Northern Pac. Ry. Co. v. Townsend*, 84 Minn. 152, 87 Am. St. Rep. 342, 86 N. W. 1007; *Wilnot v. Yazoo etc. R. Co.*, 76 Miss. 374, 24 South. 701; *Paxton v. Yazoo etc. R. Co.*, 76 Miss. 536, 24 South. 536; *Spottiswoode v. Morris etc. R. Co.*, 61 N. J. L. 322, 40 Atl. 505; *Texas etc. R. R. Co. v. Maynard* (Tex. Civ. App.), 51 S. W. 255; *Northern Pac. Ry. Co. v. Ely* (principal case), 25 Wash. 384, 65 Pac. 555; *Northern Pac. Ry. Co. v. Hasse* (Wash.), 68 Pac. 882; *Bobbett v. Southeastern Ry. Co.*, L. R. 9 Q. B. Div. 424.

On principle there would seem to be no reason for exempting a railroad company from the operation of the statute of limitations. Its right of way, however much it may be devoted to a public use, remains private property. Its officials are not public officers in any true sense; its object is private gain. Streets and highways belonging to and created for the sole purpose of benefiting the public are uses in no way analogous to that of a railroad right of way. A railroad company has, what a public officer has not, a direct and pecuniary interest in using diligence to assert its claims to any land held by it. There can be no question of legalizing a public nuisance by lapse of time. Sovereign rights are not involved. None of the considerations which render the application of the doctrine of adverse possession to public rights inexpedient and unwise are here present, and it is difficult to see why the same rule as that governing individuals and private corporations should not here control.

GRIFFIN v. CATLIN.

[25 Wash. 474, 65 Pac. 755.]

ACKNOWLEDGMENT OF NOTARY—SUFFICIENCY.—The omission of the notary's place of residence in his certificate of acknowledgment of a mortgage is not such material defect as to invalidate the mortgage as against third persons. (p. 783.)

Allen & Allen, for the appellants.

Martin, Joslin & Griffin, for the respondents.

474 PER CURIAM. Action to foreclose a mortgage upon certain described real estate, executed by defendants Jerome Catlin and Eva Catlin to plaintiff, Griffin, in September, 1895, to secure a promissory note of sixteen hundred dollars, of even date therewith. The appellants were made parties in the usual allegation of having or claiming some interest in a part of the real estate included in the mortgage. Appellants answered, denying each allegation of the complaint, and alleging that appellants recovered judgment in the sum of four hundred and four dollars and fifty cents against Catlin and wife upon a debt due appellants, and that thereafter an execution was levied upon such judgment against a certain described portion of the real estate included in the mortgage, alleging sale duly made thereunder, and purchase thereof made at such sale by appellants. It is also set up that

the mortgage was ⁴⁷⁵ executed to plaintiff for the purpose of hindering, delaying, and defrauding appellants and other creditors of the Catlins.

An examination of the record shows that the allegation of fraud was not sustained at the trial. There are but two points made in the argument for appellants: That the mortgage was not acknowledged as required by law, and was invalid; and that the residence of the notary was not added to the certificate—it was regular in all other respects. The acknowledgment conforms to the form specified in section 4533 of Ballinger's Code, which section declares: "A certificate of acknowledgment, substantially in the following form, shall be sufficient." There are some cases, as *Gates v. Brown*, 1 Wash. 470, 25 Pac. 914, and *Stetson-Post Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108, cited by appellants to sustain their contention, but in those cases the official seal was omitted, which was a material defect. The omission of the notary's place of residence is not a material defect. No error is observed in the decree of the court ordering the sale of the property.

The judgment is affirmed.

Acknowledgments.—It is the policy of the law to uphold certificates of acknowledgments: *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 South. 562. Acknowledgments are to be sustained if possible: *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108. A substantial compliance with the requirements of the statute as to the acknowledgment and the form of the certificate is all that is necessary. And the omission of immaterial facts and words is not fatal to the certificate: See the monographic note to *Livingston v. Kettelle*, 41 Am. Dec. 169, 174. The rights of a judgment creditor of a grantor are not affected by a mistake of the notary in taking the acknowledgment in one county but certifying, by mistake, that he is a notary of another county: *Roberts v. Robinson*, 49 Neb. 717, 59 Am. St. Rep. 567, 68 N. W. 1035. On the conclusiveness of acknowledgments, see the monographic note to *American Freehold etc. Co. v. Thornton*, 54 Am. St. Rep. 150-159.

STATE v. SKILBRICK.

[25 Wash. 555, 66 Pac. 53.]

LARCENY—DISHONEST GAMBLING.—If a person stakes and loses his money at a dishonest game, not knowing it to be such, and in reliance upon a statement made by one of the persons conducting the game, that he stands an equal chance of winning, when he has none, the confederate conducting the game and taking his money is guilty of larceny. (pp. 785, 786.)

J. F. Dore, J. E. Hawkins, and E. E. Brennan, for the appellant.

W. S. Fulton, prosecuting attorney, for the state.

555 MOUNT, J. Appellant was convicted in the superior court of King county of the crime of larceny, and from a judgment and sentence appeals to this court.

It appears from the evidence that one Thomas Daley, who was a country boy, while in the city of Seattle was met by one Andrew Samson, who was a stranger to him. Daley and Samson, after some conversation, went to a saloon, and into a small room, and were discussing some portion ⁵⁵⁶ of the state of Wisconsin where Daley once resided, Samson claiming that he was also from that state. While thus engaged, they were joined by one Herman Hilger and Skilbrick, the appellant. A game of cards was proposed, and Daley, after the other three had played for a little time, was induced also to play. The game was what is commonly known as poker. Upon the deal the cards were so manipulated that Skilbrick, the appellant, held four tens, Daley four queens, and Hilger four kings. Samson's hand being of no value, he threw it aside, but persuaded Daley to show him his hand. Samson then told Daley that he held the best hand, to get all the money he could, and wager it on the hand. Each of the parties then placed his cards in an envelope, and Samson, taking the remainder of the cards, went with Daley and Hilger to a bank, where Daley had his money. After getting the money, they went back to said saloon, where appellant had remained, and proceeded to bet on the hands. When the money, amounting to sixty-one dollars for each of the three players, was all on the table, and the cards displayed, Samson "grabbed" the money and Hilger took it from him. Thereupon all separated. Daley immediately informed against the

parties, who were all arrested, and charged jointly with the crime of larceny. Separate trials were had.

Appellant requested the court to give to the jury the following instruction: "If you find the prosecuting witness Daley engaged in a game of cards, and intended to bet and win or lose his money bet, as money is usually lost or won at cards, and allowed the money to be taken from the table without objection on his part because he had lost the bet, you will find the defendant not guilty, whatever the character of the game may have been."

There can be no other conclusion from the evidence in the case than that Hilger, Samson, and the appellant, Skilbrick, ⁵⁵⁷ were confederates; that the game was a dishonest game; that Daley had no chance of winning; that the confederates knew what Daley had in his hand; and that there was no element of chance for them in the game. Daley was entirely ignorant of the character of the game. He testified that he believed it to be an honest game of poker. Rapalje, in his work on Larceny and Kindred Offenses, at section 14, says: "If by trick or artifice the owner of property is induced to part with the custody or naked possession of it to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny. Thus it is larceny where the defendants so fraudulently conduct a gambling game or lottery as to give the prosecutor no chance of winning, and he parts with his money through fraud or fear": See, also, McClain on Criminal Law, sec. 560.

When Daley placed his money on the hazard of the cards, he did not intend to part with the title, unless it was fairly won by his opponents. When Samson, Hilger, and Skilbrick knew, before the cards were dealt, or afterward by discovery, that Daley was to lose his money through their manipulations, and where they induced him into the game, and one of them, by telling him he had the best hand, persuaded him to place his money on the table, for the purpose of obtaining his money, as they evidently did in this case, it was as much larceny as though they had induced him to lay his money on the table for them to examine and then had taken it by some sleight-of-hand performance, which Daley did not understand, or by force under his protest. The object of the conspirators was to get the money. That they got possession of it through a trick or through fraud, by leading

Daley to believe he would stand an equal chance of winning when he had none, or that they got it by taking it without his consent, ⁵⁵⁸ makes no difference; the crime would be larceny in either event: *Miller v. Commonwealth*, 78 Ky. 15, 39 Am. Rep. 194; *People v. Rae*, 66 Cal. 423, 56 Am. Rep. 102, 6 Pac. 1; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *People v. Shaw*, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121.

The instruction complained of assumes that where a person loses at a dishonest game, not knowing it to be such, the person conducting such game is not liable for larceny. The weight of authority does not support the appellant's contention. It was not error of the court to refuse the instruction.

The cause is therefore affirmed.

Reavis, C. J., and Fullerton, Anders, Hadley, and White, JJ., concur.

What Constitutes Larceny is discussed in the monographic note to *State v. Homes*, 57 Am. Dec. 271-286. Obtaining money by fraud, trick, or artifice may amount to larceny: *Doss v. People*, 158 Ill. 660, 49 Am. St. Rep. 180, 41 N. E. 1093; *Commonwealth v. Flynn*, 167 Mass. 460, 57 Am. St. Rep. 472, 45 N. E. 924; *Beasley v. State*, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35; *Commonwealth v. Lannan*, 153 Mass. 287, 25 Am. St. Rep. 629, 26 N. E. 858. The taking of money by confederates on a sham bet contrived by them to defraud a person advancing the money and taking part in the transaction is larceny: *People v. Shaw*, 57 Mich. 403, 58 Am. Rep. 372, 24 N. W. 121; *Miller v. Commonwealth*, 78 Ky. 15, 39 Am. Rep. 194. So it is larceny in case the defendants so fraudulently conduct a game of monte as to give the prosecutor no chance of winning, and he parts with his money through fraud and fear: *United States v. Murphy, MacArth. & Mack*, 375, 48 Am. Rep. 754.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

EELLS v. CHESAPEAKE AND OHIO RAILWAY CO.
[40 W. Va. 65, 38 S. E. 479.]

LIMITATIONS, STATUTE OF—DAMAGES FOR INJURIES, WHEN INTERMITTENT RATHER THAN PERMANENT.—If a bridge is constructed across a stream, and afterward in time of freshets throws high water upon and caves in plaintiff's land and undermines his trees, such injury is intermittent rather than permanent, and the statute of limitations against an action to recover therefor does not commence to run from the time of erecting the bridge, but only from the date of the first injury. (p. 787.)

A PRESCRIPTIVE RIGHT TO MAINTAIN A BRIDGE in such a manner as may cause injury to a land owner cannot be sustained where there has been no acquiescence on his part, and whether there has been such acquiescence is a question of fact which must be submitted to the jury. (pp. 788, 791.)

PRESCRIPTION—TIME OF COMMENCEMENT.—Where a prescriptive right to maintain a bridge is insisted upon as a defense to an action to recover for injuries suffered by a land owner from its maintenance, the time upon which the prescriptive right is founded must be computed, not from the erection of the bridge, but from the date when it has inflicted some appreciable damage to the plaintiff's property. (pp. 790, 791.)

John Baker White and Philip G. Walker, for the plaintiff in error.

Simms, Enslow & Alderson, for the defendant in error.

⁶⁵ **BRANNON, P.** Hettie Eells brought an action of trespass on the case in the circuit court of Kanawha county against the Chesapeake & Ohio Railway Company, alleging as her cause of action that that company had built a bridge for railroad purposes across a stream, and so constructed its piers and abutments obliquely in ⁶⁶ the stream that they changed the natural course of the current and directed it against

a certain lot of land of the plaintiff, causing the same to wash away and cave in to a specified extent and undermining a number of forest and shade trees left there as a protection of the lot as it fronted on said stream. Upon the trial, upon the evidence of both plaintiff and defendant, the court directed the jury to find a verdict for the defendant, and rendered judgment for the defendant, and the plaintiff sued out this writ of error.

I confess that I have encountered considerable difficulty in the consideration of this case. The important question in the case as presented to this court is whether the action is barred by the statute of limitations. The bridge was built in 1870, and this suit was brought in January, 1898. The bridge remained as to this matter the same as when built. The question is whether the injury is of that character called a permanent injury, so that the plaintiff must sue at once after the building of the bridge, or at latest from the very first detriment from it to the plaintiff's lot, and recover damages in one action as for a permanent and enduring injury, entire damage for the whole injury, or whether she could sue at any time for the injury as it occurred at intervals, and recover for any damage within five years of its occurrence. The question is whether the injury of the plaintiff in this case, if any exists, is one known in the law as a permanent injury, requiring the action to be brought from the first instance of damage, within five years thereafter; or is that injury such as is known in law as recurring, intermittent and continuous? In the one case the action is barred; in the other it is not. If the injury is, in legal aspect, of the latter character, though the bridge was erected in 1870, and remained unchanged, and though the first distinguishable item of damage from it was shortly thereafter, yet the plaintiff could disregard it, and wait silent until the occurrence of another item of damage from freshet happening afterward, and sue for damage to her lot from that occurrence, and other items of damage, within five years from their happening. We are of the opinion that the injury, if any, is to be classified as intermittent, not permanent. The mere building of the bridge did not cause any injury to the plaintiff. She could not sue for that alone. She could not sue until high water came and its force was, by reason of that bridge, thrown against her lot, and she received damage therefrom. ⁶⁷ That damage would be occasional as freshets might come, recurring,

intermittent, one freshet doing some damage, another doing additional or greater damage. I shall not discuss this intricate question and the nice lines of discrimination found in the law on the subject. As I remarked in *Henry v. Ohio River R. Co.*, 40 W. Va. 234, 21 S. E. 863, the lines of thought and demarcation are close, the application of principles to instances difficult, and the authorities variant. The cases are very numerous on the subject. I will simply refer to the *Henry* case and its citations, and *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87, and *Drake v. Chicago etc. Ry. Co.*, 63 Iowa, 202, 19 N. W. 215. Thus, so far, the action is not barred. But counsel for the railroad company introduced another point. They contend that even though the alleged injury is to be classified, not as one of permanent character, but intermittent, yet that time has established the right of the company to continue the bridge in the condition in which it was when built, though it does work damage to the plaintiff on occasions as time passes. They say they have acquired right to do this by prescription. This is a grave question in the case. It is established by many authorities that one man can by prescription gain a right of way over another man's land; that one man can by prescription gain a right to back water or flow water over another man's land by means of a mill-dam or the like. Many incorporeal rights or easements can be established by prescription: *Nicholas v. Aylor*, 7 Leigh, 546; *Field v. Brown*, 24 Gratt. 74; *Coalter v. Hunter*, 4 Rand. 58, 15 Am. Dec. 726; *Smith v. Russ*, 17 Wis. 227, 84 Am. Dec. 739; *Jones on Easements*, sec. 158. I take it that upon the same principle a right such as that involved in this case could be established by prescription. It is essential, however, that we should be careful about the law of prescription. An important element to establish it is, that the party whose land is to be made subject to a right in another by prescription should be chargeable with acquiescence in the exercise of that right by the other party. The prescription of which we here speak is different from the statute of limitations, which is a bar whether the party acquiesce or not; but to establish an incorporeal right by prescription, acquiescence by the party affected by it must exist. If it be shown that that party protested against the exercise of that right, denied that right, then no time will establish it. There are many ways in which such protest may be manifested. Anything showing that the party did not recognize,

but repudiated and denied, such ^{as} right, will prevent its existence, will prevent its consummation. The cases above cited show this. It is elsewhere abundantly shown: *Powell v. Bagg*, 8 Gray, 441, 69 Am. Dec. 262; *Angell on Water-courses*, sec. 200. The reason for this rule is that from length of time the law presumes that a grant of the right was once made, but, not appearing, has been lost. Such has been the reason of the right given from the earliest time. Now, in this case it does not appear distinctly whether the plaintiff protested or not. It was a question of fact whether she did or not, a question for the jury, under all the circumstances; but the court took that question away from the jury. I incline to think this was error as to this point. Acquiescence is clearly a question of fact: *Thomas v. England*, 71 Cal. 456, 12 Pac. 491. It is true that enjoyment of the right for the period prescribed establishes that right as a conclusion of law; but whether under all the circumstances of the case it could be inferred that the plaintiff from silence acquiesced in such right, it seems to me was likely one proper to be left to the jury. But there is another view which is stronger with me to show error in withdrawing the case from the jury. It is this: Suppose we were to say that it is such a case as prescription would apply to, still prescription, like limitation, has its period and must have a point of commencement in time. In this case that point of commencement is not, as claimed, the date of the erection of the bridge. That erection, only and simply, would not start time running to establish prescription. The company had a perfect right to build the bridge. The plaintiff could not either sue or protest for that only, but only for damage consequent upon such erection, occurring some time thereafter, that is, when the water washed some portion of her lot away. It is well settled that the following extract from *Jones on Easements*, section 165, states the true law: "A right of action must have arisen for the adverse user to constitute a right by prescription; there must have been such an invasion of the rights of the party against whom the right is claimed that he would have a cause of action against the intruder": *Smith v. Russ*, 17 Wis. 227, 84 Am. Dec. 739; *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890; *Wood on Nuisances*, sec. 719; *Klein v. Gehrung*, 25 Tex. Supp. 233, 78 Am. Dec. 565. Therefore, the question is important in determining whether a right in the company to maintain these abutments

and piers, and by them to change the current of the stream to the injury of the plaintiff's lot. When did the "69 first appreciable damage, if any, to the plaintiff's lot from that bridge occur? From that point of time prescription commenced to run. When that first damage occurred is a question of fact. Whether ten years elapsed from it is a question of fact. There was a great deal of evidence before the jury bearing on that crucial point, crucial for the solution of this point. The plaintiff claimed it was later in date than did the defendant. The court took the solution of that question away from the jury, and therein erred.

If in fact that bridge did change the natural course of the current of Coal river and thereby injure the plaintiff's lot; if that and not the natural flow did the injury, then that injury is one consequential from the building of the bridge, and dates from the first injury or damage, not from the building of the bridge. 2 Wood on Nuisance, section 708, says: "There is a distinction between a prescriptive right to do some act upon one's own premises that operates injuriously to another, and a right to do some act upon another's premises. In the latter case, each act of user, before the user ripens into a right, is a trespass, for which an action may be maintained at any time, while in the former no action can be maintained until some right has been invaded. In the one case there is an actual invasion of the property itself, while in the other there is a mere invasion of some right." In the one case the mere exercise of the right, like a right of way over another's land, or a backing of water by a dam, is at once the commencement of the right; but in the other case, like the case in hand, where the injury is a mere consequence, not occurring eo instanti, it is otherwise. That bridge may have been causing the injury for a period sufficient to raise a prescription; but whether it had or not was a question for the jury.

All questions of fact are left untouched by this decision. It is because the court took the material questions from the jury that we reverse the judgment. There was enough evidence bearing upon those questions before the jury to call for the case being tried by a jury: See *Ketterman v. Dry Fork Ry. Co.*, 48 W. Va. 606, 37 S. E. 683. Judgment reversed, verdict set aside, new trial granted.

The Statute of Limitations does not Begin to Run against a land owner's right of action for the unlawful flowage of his land until he has been injured and his action has accrued, notwithstanding

ing the negligent structure and other acts causing the overflow may have been growing and working for a length of time beyond the period of limitation. If a structure, when completed, is permanent in character, but not necessarily a nuisance, and afterward becomes one, the statute begins to run from the time an injury is received, and not from the time the structure is erected: *Note to St. Louis etc. Ry. Co. v. Biggs*, 20 Am. St. Rep. 177, 178. See, also, *Chicago etc. R. R. Co. v. Emmert*, 53 Neb. 237, 68 Am. St. Rep. 602, 73 N. W. 540; *Fremont etc. R. R. Co. v. Harlin*, 50 Neb. 698, 61 Am. St. Rep. 578, 70 N. W. 263; *Smith v. Seattle*, 18 Wash. 484, 63 Am. St. Rep. 910, 51 Pac. 1057; *Doran v. Seattle*, 24 Wash. 182, 85 Am. St. Rep. 948, 64 Pac. 230; *Austin etc. Ry. Co. v. Anderson*, 79 Tex. 427, 23 Am. St. Rep. 350, 15 S. W. 484.

No Prescriptive Right in land can be claimed until the claimant shows that the acts constituting the adverse user injured the complaining party and gave him a right of action: *Turner v. Hart*, 71 Mich. 128, 15 Am. St. Rep. 243, 38 N. W. 890. See, also, *Whiting v. Gaylord*, 66 Conn. 337, 50 Am. St. Rep. 87, 34 Atl. 85; *North Point Irr. Co. v. Utah etc. Canal Co.*, 16 Utah, 246, 67 Am. St. Rep. 607, 52 Pac. 163.

COOK v. TOTTEN.

[49 W. Va. 177, 38 S. E. 491.]

STREETS REPRESENTED ON MAPS AND PLATS, WHO MAY INSIST UPON THE OPENING OF.—Where streets are marked on a plat, all who buy with reference to the general plat or scheme disclosed thereby acquire a right to all the public ways represented thereon, and may force a dedication. Their right is not limited to having abutting streets opened to the first cross-streets. (pp. 792, 793.)

STREETS REPRESENTED ON PLATS, ACCEPTANCE OF DEDICATION OF NOT NECESSARY.—Where a land owner lays out his lands into lots, streets, and alleys, and has it platted and makes sales by such plats, he thereby dedicates such streets and alleys to the use of lot owners and the public, and the rights of a lot owner are not to wait in abeyance until the public authorities see fit to accept and take charge of such streets and alleys. Where the public right to use and control depends upon the acceptance or dedication, a private right of purchasers is acquired at the time of the purchase, and may precede the public's right. (p. 793.)

STREETS.—EQUITY MAY COMPEL A LAND OWNER TO OPEN STREETS represented as such on a plat by which he has sold lots, though the public authorities have not accepted the dedication. (p. 794.)

Rucker & Keller, for the appellant.

T. L. Henritze, for the appellee.

178 DENT, J. E. E. Cook filed his bill in chancery against H. P. Totten in the circuit court of McDowell county setting forth that at the instance of the defendant he had purchased

two certain lots Nos. 72 and 73 on the map of the town of Kimball as laid off and platted by the defendant, on one of which he had erected a valuable dwelling-house for his own use, that to enjoy such property it was necessary that certain streets as laid down on such plat should be opened, but that the defendant, who owned the land, still kept them fenced up and prevented plaintiff from having the use thereof, to his detriment, inconvenience, and injury, and he prayed for a mandatory injunction compelling the defendant to open and leave open such streets for the benefit of plaintiff in the enjoyment of such lots.

Defendant demurred and answered, claiming that the streets were not dedicated to the public, still belonged to him, and were not necessary to the plaintiff's proper enjoyment of his property and denied the right of plaintiff to the relief sought. The circuit court sustained the bill and granted the relief, and defendant appeals.

The question as to whether the streets sought to be opened were necessary to the proper enjoyment of plaintiff's property is a question of evidence, and, being founded on conflicting testimony, this court will not disturb the finding of the circuit court with regard thereto unless plainly wrong: *Weaver v. Aikin*, 48 W. Va. 456, 37 S. E. 600. This the court cannot say. The case must be determined on the legal rights of the plaintiff. The law seems to be settled that: "It is not only those who buy land or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of the street or road; but where streets and roads are marked on a plat and lots are bought and sold with reference to the plat or map, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right in all the public ways designated thereon, and may force the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as it well may be, that the public ways add value to all the lots embraced ¹⁷⁹ in the general scheme or plan; certainly, as everyone knows, lots with convenient cross-streets are of more value than those without, and it is fair to presume that the original owner would not have donated land for public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not, therefore, to be permitted to take it from them by revoking part of his dedication." A contrary holding

prevails in some jurisdictions, which limit the purchaser to the right of having abutting streets opened to the first cross-streets: *Elliott on Streets and Roads*, 2d ed., 132. The unity doctrine of the plat or plan is decidedly the most equitable, for the reason that the opening of remote streets may render the purchased lot more accessible and more valuable by creating a more direct and easy way thereto, while the opening of comparatively near streets might be of none or little value to the lot in question. In the case of *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749, it is held that according to the great weight of judicial opinion the lot purchaser is entitled to the use of all the streets and ways, near or remote, as laid down on the plat by which he purchases: *Rowan v. Portland*, 8 B. Mon. 232; *Trustees v. Perkins*, 8 B. Mon. 207; *Winona v. Huff*, 11 Minn. (180) 119; *Huber v. Gazley*, 18 Ohio, 18; *Derby v. Alling*, 40 Conn. 410; *Moale v. Mayor etc.*, 5 Md. 314, 61 Am. Dec. 276. This being the law, the land owner, when he lays off his land into lots, streets, and alleys, and has the same platted, and then sells lots with reference to the map thereof, must be presumed to know that he thereby dedicates such streets and alleys to the use of such lot owners and the public, and the rights of the lot owner are not to wait in abeyance until the public authorities see fit to accept and take charge of such streets and alleys, but he is at once entitled to have all such streets and alleys opened for his use, necessary to the enjoyment of his property. All such streets and alleys must be considered as appurtenant thereto, for they begin at his property and extend in a network all over the land platted: *Wolfe v. Town*, 133 Ind. 331, 32 N. E. 1017; *In re Pearl St.*, 111 Pa. St. 565, 5 Atl. 430. While the public right to use and control depends on the acceptance of the dedication to public uses, the private right of purchasers is acquired at the time of the purchase and may precede the public's right: *Elliott on Streets and Roads*, 2d ed., sec. 118, p. 128.

The public authorities may never accept the dedication, and ¹⁸⁰ yet the lot owners would be entitled to use the streets and alleys from the very time of their purchase, and the land owner cannot exclude them from this right. Having sold the lots according to the plat, he must accord to the purchasers the use of the streets and ways as shown thereon. The deeds involved in the present controversy each convey "a certain lot of land in the town of Kimball, McDowell

county, West Virginia, and known in the plan of said town as lots Nos. 73 and 72 according to the plan of said town as surveyed by W. C. Brooke, civil engineer, which said plan is recorded in the McDowell county court clerk's office," thus making the plan and survey a part of the conveyance, as much so as if fully set out in such deeds. The plaintiff having thereby acquired a full right to the use of the streets and alleys by purchase, the easement therein passing as appurtenant to the lot to whose enjoyment they are necessary, as the law affords him no complete remedy, may appeal to a court of equity to enforce such right for his benefit: *Boyd v. Woolwine*, 40 W. Va. 282, 21 S. E. 1020. Having purchased his lot as part of the plan or addition to a town, he becomes interested in all the streets and alleys thereof for the reason that the value of his lot, together with its proper use and enjoyment, is dependent thereon, and if the land owner is permitted to close up one street, he may close them all up, except those immediately abutting the purchaser's lot, and thus render it valueless, even though the price paid was in consideration of the dedication of the whole plan to the purposes and uses of a town. A single town lot is of little value by itself in the center or on the edge of a large tract of land. It is only worth so much per acre as the land is worth. The value of each town lot is dependent on the value and improvements of all the other lots, and of the streets and alleys open to public uses included in the same general plan or plat. Each deed in this case not only conveyed the lots according to the plan, but also conveyed all the appurtenances belonging thereto, which necessarily includes the easement in all the streets and alleys of the plan necessary to the use, enjoyment, and value of the lots, and though the public never accept the same, the lot owner is entitled to the right to the proper enjoyment thereof. In such a case as this plaintiff cannot be compelled to seek redress at law in an action for damages, but he has the right to have his contract specifically enforced. Nor can he be compelled to await until the public authorities accept the dedication of the streets and alleys, which may never occur, especially ¹⁸¹ if the land owner is permitted to keep them closed up, and refuses a further sale of lots.

The decree complained of is affirmed.

Dedications for Streets and Highways are considered in the monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 740-757.

Consult, also, *Matter of Hunter*, 163 N. Y. 542, 79 Am. St. Rep. 416, 57 N. E. 735; *Prescott v. Edwards*, 117 Cal. 298, 57 Am. St. Rep. 186, 49 Pac. 178. Where lots have been sold by reference to a plat representing a division of a large tract of land into subdivisions of streets and lots, the purchaser of a lot acquires a right to have all and each of the ways and streets on the plat kept open: *Collins v. Asbeville Land Co.*, 128 N. C. 563, 83 Am. St. Rep. 720, 39 S. E. 21. Compare *Pearson v. Allen*, 151 Mass. 79, 21 Am. St. Rep. 426, 23 N. E. 731.

ROWAN v. CHENOWETH.

[49 W. Va. 287, 38 S. E. 544.]

LIMITATIONS.—THE DEATH OF THE PARTY IN WHOSE FAVOR A CAUSE OF ACTION EXISTS does not stop the running of the statute of limitations, though no representative of his estate is appointed. (p. 798.)

PUBLIC OFFICE.—A PARTNERSHIP IN A PUBLIC OFFICE cannot exist, because it is against public policy, but there may be a deputyship with the services of a deputy to be compensated by a share of the emoluments of the office. (p. 799.)

A TRUST IS NOT CREATED BETWEEN AN OFFICER AND HIS DEPUTY with respect to moneys received by the latter for the former. (p. 799.)

THE STATUTE OF LIMITATIONS BEGINS TO RUN AS BETWEEN A PRINCIPAL AND AN AGENT where the agency is continuous and involves many acts and collections of money at the termination of the agency. (p. 799.)

EVIDENCE.—A BOOK MADE BY A DECEASED PERSON is not evidence in favor of his administrator to show the state of accounts between the deceased and another, where such book was not made as the business was carried on, but several years after it closed, unless the defendant calls for and uses part of it as evidence, in which event the whole writing or account must be received. (pp. 800, 801.)

PROMISSORY NOTES, CONSTRUCTIVE DELIVERY OF TO CHILDREN.—If a father intends to execute notes in favor of his minor children for a sum due from him to their deceased mother, and in fact signs such notes, exhibits them to sundry relatives of his and hers, and expresses himself as bound by them, this must be regarded as a sufficient constructive delivery to the payees. (p. 803.)

L. D. & J. F. Strader and C. Wood Dailey, for the appellant.

Harding & Harding, George W. Lewis, and Mollohan, McClintic & Matthews, for the appellees.

288 BRANNON, P. S. A. Rowan, as administrator of Z. T. Chenoweth, filed a bill in chancery in the circuit court of Randolph county to convene the creditors of Chenoweth, fix their debts, settle his accounts and the personal estate, and

sell the lands of Chenoweth to pay debts not reached by the personalty. The suit began the 31st of August, 1894. The case was referred to a commissioner to report the debts against the estate and other matters involved in the suit. ²⁸⁹ George W. Leonard appeared before the commissioner and filed a demand against Chenoweth's estate, and the estate filed an account of setoffs against him. The commissioner reported a balance against Leonard in favor of the estate, and upon the report the court decreed the sum of three thousand one hundred and thirteen dollars and thirteen cents against Leonard, and he appeals.

Chenoweth was sheriff of Randolph county for the years 1885, 1886, 1887, and 1888, and Leonard his deputy. The claim of Leonard is that he was to receive for his services as deputy half the entire emoluments of the office. The commissioner disallowed the claim of Leonard for half the commissions and other fruits of the office for want of proof of what compensation Leonard was to receive, but charged him with the taxes which went into his hands. Strange to say, there was no written agreement between the parties to specify the arrangement between them in this important business, no bond given by Leonard; still I think that, in the absence of such writing, it is fairly and reasonably established that Leonard's claim of half the emoluments is true. Omar Conrad, a deputy sheriff and jailer, says that he knew of no agreement between Chenoweth and Leonard, but was by at times when they were settling, and it was "my understanding from the conversation between Chenoweth and Leonard that they were halvers in the business." Charles Chenoweth, brother of Z. T. Chenoweth, was for a time jailer, and says that though he knew of no agreement, his understanding was that they were partners. He was in constant intercourse with them. It seems he is not merely conjecturing. The widow of Chenoweth assisted her husband in making out elaborate entries in 1892 in a book of her husband of taxes in the various districts and other items, and made entries at his dictation, which book, so far as it concerned taxes in the various districts chargeable to Leonard, and a settlement made between them for the year 1885, and partly for 1886, was made for the purpose of settlement with Leonard, and she says that she does not remember hearing her husband say how Leonard was to be compensated, "though my impression is he was to receive one-half the emoluments of the office." She must

have derived this impression from impartment by her husband. She would not have guessed it. But to make this sure she produced from among her husband's papers two receipts given him by Leonard, dated the 21st of February, 1887, ²⁹⁰ one for payment to Leonard of eighty-seven dollars and fifty cents, "it being one-half of the allowance of the sheriff for 1886," and for thirty-nine dollars and twenty cents, "it being one-half jail rent from Omar Conrad and Charlie Chenoweth, 1885 and 1886." The other receipt is for eight hundred and forty-three dollars and five cents, "it being one-half of the sheriff's commission on state, county, district, schools, and district schools for the year 1885." Now, these are enough to enable us to say that Leonard was to receive half the emoluments.

But Leonard's rejected claims are barred by limitation, in the absence of evidence of actual collection within five years before the suit. Particular collections shown to have been made within five years could be recovered by either side, and those only. Those items would not save others collected before from the statute. The statute began to run against Leonard in Chenoweth's lifetime, and his death did not stop it, even though he had no representative: *Handy v. Smith*, 30 W. Va. 195, 3 S. E. 604; *Wilson v. Harper*, 25 W. Va. 179; *Mynes v. Mynes*, 47 W. Va. 681, 35 S. E. 935. When did the statute stop running against Leonard? By various decisions it ran on until the court made a reference for the benefit of all creditors to ascertain and decree their debts: *Laidley v. Kline*, 23 W. Va. 565; *Northwestern Bank v. Hayes*, 37 W. Va. 475, 16 S. E. 561. Those cases were suits by individual creditors against estates. Until reference it could not be known that the suit would go on for all; hence the other creditors might till then sue. But we think that when an administrator brings such a suit as this, as the estate's representative, to administer the personal estate and apply it and the realty both for all creditors, it is a guaranty of prosecution to the end; the creditors may demand that it go on, and the statute stops running against creditors at its institution. The code gives the personal representative power to bring such a suit as the vehicle of relief for all creditors, gives him a right to do so to the exclusion of creditors for six months after the qualification of a representative; and this statute would contemplate the cessation of the statute of limitations at the date of such suit: Code 1899, c. 86, sec. 7. When one creditor

sues expressly for all creditors, the statute stops at date of suit: *Jackson v. Hull*, 21 W. Va. 612; *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102; *Hogg's Equity*, 618. When did the statute of limitations commence to run against Leonard's demand for commissions on taxes and executions, and for jail rent, county allowances, and fees? We cannot ²⁹¹ solve this question by saying that Chenoweth and Leonard were partners. There can be no partnership in a sheriffalty. It would be against public policy. We cannot apply the statute as between partners. There may be a deputyship, with services of the deputy to be compensated by a share of the emoluments without its being contrary to law or a partnership: *Davis v. Baker*, 45 W. Va. 455, 32 S. E. 239. A deputy is simply an agent appointed by the sheriff to perform service for him; it is the relation of principal and agent: *Poling v. Maddox*, 41 W. Va. 781, 24 S. E. 999; 9 Am. & Eng. Ency. of Law, 2d ed., 369. Hence the statute applies as between man and man, as for money had and received, in this case. We must not regard the relation as one of trust, not subject to the statute. In a sense it is a trust. So is any case where a man intrusts money to another. But it is not that special and peculiar trust cognizable in a court of equity only, where the statute does not apply, for an action of assumpsit lies for money had and received or for services between principal and agent. This subject is discussed and this principle held in *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, 581, 23 S. E. 795, and *Wood v. Stevenson*, 43 W. Va. 149, 27 S. E. 309. "The trusts against which the statute does not run are those technical and continuing trusts not cognizable at law, and falling within the proper, peculiar, and exclusive jurisdiction of equity; but such other trusts as may be ground of action at law are subject to the operation of the statute": *Landis v. Saxton*, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912. That was the treasurer of an extinct corporation, and the statute was held to begin on the dissolution of the corporation: See *Gapen v. Gapen*, 41 W. Va. 427, 23 S. E. 579; *Hogg's Equity*, 757.

When does the statute begin to run between principal and agent? That depends on the character of the agency. Where there is an isolated or special agency, one for a particular act or acts, one to collect a specific debt or debts, the statute begins from the act or collection in each particular case; but where the agency has currency, is continuous, is general, involving many acts, or a course of business involving many transac-

tions, the statute begins from the termination of the agency. The contract of agency is a lump, covering several years, covering many items, and the parties reserve them for settlement some day ahead. You cannot start the statute at date of each collection or each item of liability, innumerable items in an account which both sides treated as open, and there is a necessity to fix some day: 1 Robinson's Practice, 488; 1 Wood on Limitations, 347, 349, note 2; Angell on Limitations, sec. 181, note 2; ²⁹² Hopkins v. Hopkins, 4 Strob. Eq. 207, 53 Am. Dec. 663; Estes v. Stokes, 2 Rich. 320. The Virginia case of Riverview Land Co. v. Dance, 98 Va. 239, 35 S. E. 720, holds that in continuous agencies the statute begins at their termination; but that if the law gives a right to either to demand payment before, it runs from demand and refusal. No doubt there can be a demand for adjustment giving cause of action at once; but as a general rule, in the absence of special circumstances changing it, as there may be, the statute starts at the close of the agency. The books show that the statute applies between principal and agent. Its wise policy to have an end of liability and give peace of mind, happiness of life, and to prevent litigation, should be liberally applied, as well to this relation as others. Therefore, Leonard's demands for emoluments of office and store account were barred when the suit began.

How as to Chenoweth's demands against Leonard? The commissioner charged Leonard with taxes put in his hands for collection upon no other evidence than entries made by Chenoweth and his wife under his dictation in a book in 1892. Counsel claim that this is illegal evidence. Though fully discussed by counsel, no authority is furnished by either side on this point, and I have been compelled to seek it. Leonard called for this book, and the commissioner thought that this fact made it evidence not only for, but against, Leonard. The reverse is claimed as true. Entries made by Chenoweth against his own interest would be admissions, and admissible against him, because he would not make self-disserving admissions unless true; but his entries against Leonard would be self-serving declarations, made in his own interest, not admissible to Leonard's prejudice. "Scriptura pro scribente nihil probat," is a fixed maxim. "A party's self-serving declarations cannot be put in evidence in his own favor, whether he be living or dead at the trial": 2 Wharton on Evidence, secs. 1100, 1101; 1 Greenleaf on Evidence, 17th ed., sec. 147; Vinal v.

Gilman, 21 W. Va. 301, 45 Am. Rep. 562; see High v. Pancake, 42 W. Va. 602, 26 S. E. 536; Crothers v. Crothers, 40 W. Va. 169, 20 S. E. 927.

The book is not admissible as a book entry made in due course of business, while the business current went, and thus a part of the *res gestae*, as it was made out several years after the business closed, not as an itemization as items in business occurred, but in a lump, as a whole, with a view to settlement as between themselves: 1 Greenleaf on Evidence, secs. 120a, 120b; 1 Wharton on Evidence, secs. 681, 683. ²⁹³ Under these principles the book would not be evidence for Chenoweth, if offered by his administrator; but the rule is that when a party calls for the production of and uses a writing or account of his adversary, the whole writing, the whole account, debits and credits, is thus made evidence in the case. It cannot be garbled; one side or showing of it merely cannot be used for hurt of one party to the benefit of another: 1 Greenleaf on Evidence, sec. 563; Wharton on Evidence, secs. 620, 1103; Jones v. Jones, 4 Hen. & M. 447; Freeland v. Cocke, 3 Munf. 352. So the commissioner did not err in acting on the evidence.

But, as I understand from the report, Leonard relied upon the statute of limitations. Is the demand of Chenoweth's estate barred? There is no written contract, no bond given by Leonard as deputy sheriff. The plaintiff did not make Leonard a party to the case or set up any demand against him until after Leonard filed his account before the commissioner, when, on the 1st of April, 1896, the administrator filed his account of setoffs. When did right of action accrue? At the close of the term, December 31, 1888, the close of agency. The statute ran from then until said setoffs were filed: Hurst v. Hite, 20 W. Va. 183. So says the code, chapter 126, section 9. The suit did not stop the statute as to Chenoweth's demand, as the bill did not set up a demand against Leonard and make him a party: Woodyard v. Polsley, 14 W. Va. 211. So it seems that the charges made by the commissioner and decree against Leonard for taxes in his hands are erroneous because they were barred by limitation. This troublesome subject of limitation is presented by counsel for decision, but not a line of law is cited by counsel on either side upon it. It seems that the court should have the aid of the research and conclusions of counsel, especially of counsel so well able to give aid as those engaged in this case.

There is another matter calling for decision. Chenoweth's first wife derived from her father's estate about two thousand two hundred dollars. No one disputes this. It is clearly proven by his many declarations and independent evidence. Chenoweth took charge of it only to invest for her, and did invest it, perhaps in his own name, but in fact for her. It is beyond any denial, free from denial, proved that he declared it her separate estate, as it was in law, and said that he was increasing it by ten per cent interest. He never set up the slightest claim to it. By this first wife Chenoweth had two children, Joseph S. and Willie ²⁰⁴ V. Chenoweth. This first wife died. There were found among Chenoweth's papers after his death four promissory notes, dated December 21, 1889, two of them payable to Joseph S. Chenoweth eight and nine years after date, one for one thousand dollars, the other for five hundred dollars, and two like notes payable to Willie Voves Chenoweth, and they were presented before the commissioner and reported as debts against his estate. The administrator contests their validity. It is claimed that they have no force for want of delivery. There can be no valid deed or promissory note without delivery; but a constructive delivery is sufficient. It must be confessed that it is somewhat difficult to hold these notes valid; and yet the plainest justice calls for it, if it can be done at all consistently with law, as I think it can. That a husband may be debtor to the wife for the loan of her separate estate is clear, if intended as a loan, not a gift: *Ka-awha Valley Bank v. Atkinson*, 32 W. Va. 210, 25 Am. St. Rep. 806, 9 S. E. 175. Here it was not a loan; he took it only to invest. As to the honesty of this transaction, there is no attempt at its impeachment, no whisper. It is fully proven that the wife had this separate estate, and committed it to her husband's hands for investment only, and he always so acknowledged. But the question, the only question, is, Are these notes invalid for want of delivery? Chenoweth executed these notes. He must have intended them to have some effect. Why did he not deliver them? Because the payees were mere children under his own roof. Who better or safer than he as the custodian of these notes? he likely, as a man unlearned in law, thought. He intended them to bind him and his estate, as we can with clear confidence say under the evidence. His mother swears that the first wife died June 23, 1888, and that when Chenoweth informed his mother that he was going to marry again, she asked him, "Are you going to

save these children's money for them?" and he replied that he was. After his second marriage the mother says he called her into a room and produced these very notes, read them to his mother, and said he wanted to carry out the request of the mother of these two children, and he wanted her (his own mother) to be satisfied about it. The children were staying with their grandmother and father at the time of the first conversation. Now, these explicit declarations to the grandmother so deeply interested in these children, and who was anxious that justice be secured to them, tell us that Chenoweth intended finally that these notes should bind him, and that he retained ²⁹⁵ possession only for their safety for his children. The grandmother after the second marriage was on the eve of going to the far west, and went, and she was shown the notes to satisfy her solicitude. Chenoweth's sister, in his last illness, asked him in what part of his property the money of these children was, and he replied, "In any of, in all of it," and said that his mother knew all about it, that he had shown the notes to her before she went west. The evidence is plenary from his mother, sister, and M. D. Smith, the brother of the first wife, that she always claimed, and he always recognized, this money as her separate estate. There is no contradiction of these facts. I say the intention of Chenoweth that these notes should bind him was full and final, and that this solves the matter in behalf of justice. In the unsatisfactory, opinionless case of *Hutchinson v. Rust*, 2 Gratt. 394, it is laid down, so far as anything is inferable, from it, that when a deed is acknowledged and retained by the grantor, it depends on the intention whether it should be regarded as a final deed, and this may be gathered from evidence of the grantor's previously declared purpose. Chenoweth's declarations to his mother and sister leave no doubt as to his intention. In *Howe v. Ould*, 28 Gratt. 1, it is held that delivery of a note may be constructive, and that numerous decisions in reference to deeds show the reluctance of courts to permit mere technicalities with respect to delivery "to defeat the intent of the parties and the manifest justice of the case." "It is not necessary that there should be a manual transfer of the note; a constructive delivery is sufficient if made with the intention of transferring title": 4 Am. & Eng. Ency. of Law, 2d ed., 202. "Delivery of a deed depends on the intent of parties, and, though not in formal words, may be shown by circumstances": *Ferguson v. Bond*, 39 W. Va. 561, 20 S. E. 591. I understand

Lang v. Smith, 37 W. Va. 734, 17 S. E. 213, to so hold. Nor is *Cann v. Cann*, 40 W. Va. 138, 20 S. E. 910, contra. There was in that case no showing, as here, of any final intent of the maker of the due bill to be bound by it; indeed, it was not regarded as genuine. Each case, when it turns on the facts, must stand on its own facts. If these notes had been made payable to strangers, or even adult children, we might demand an actual delivery; but these were children in his own house. To whom could he deliver the notes? They are a trustee's solemn admission in writing of his liability for money put in his hands to hold in trust, not a borrower's obligation. Chenoweth delivered them, in effect, to ²⁹⁶ the next friend of the children, their grandmother; he delivered them on his dying bed to their aunt for them when he declared their obligatory force on all his estate. We hold the decree right in allowing these notes. Being debts not voluntary, but based on valuable full consideration, of course they were properly allowed pro rata with other general debts, and the complaint of Virginia Collet's executor that they were not postponed to other debts is overruled. We reverse the decree and remand the case to be proceeded in as herein indicated; but without prejudice to the right of either George W. Leonard or the administrator of Z. T. Chenoweth as to any action at law between them now pending.

The Running of the Statute of Limitations is not interrupted by the death of a party where the cause of action accrued during his lifetime: *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879; *Grether v. Clark*, 75 Iowa, 383, 9 Am. St. Rep. 491, 39 N. W. 655; monographic note to *Miller v. Surls*, 65 Am. Dec. 594-598. See, in this connection, *Williams v. Long*, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264; *Broadfoot v. Fayetteville*, 124 N. C. 478, 70 Am. St. Rep. 610, 32 S. E. 804.

The Statute of Limitations does not Run Against a Principal in favor of his general agent or factor, with no stated time for accounting, until an account is rendered or a demand therefor is made. If, however, the agency is special, the statute attaches upon the consummation of the transaction; and, in case of a collection agent, the tendency is to hold that the statute begins to run immediately, regardless of whether a demand is made: See the monographic note to *Miles v. Thorne*, 99 Am. Dec. 393, 394; *Schofield v. Woolley*, 98 Ga. 548, 58 Am. St. Rep. 315, 25 S. E. 769; *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782; *Douglas v. Corry*, 46 Ohio St. 349, 15 Am. St. Rep. 604, 21 N. E. 440.

To Constitute a Gift Inter Vivos, there must be a delivery, actual or constructive: *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430, 78 N. W. 647. The delivery should be as complete as the circumstances will reasonably permit, nothing more: Note to *Pope v. Burlington Sav. Bank*, 48 Am. Rep. 789. See, in this connection, *Murphy v. Bordwell*, 83 Minn. 54, 85 Am. St. Rep. 454, 85 N. W. 915. Less positive and unequivocal proof is required

to establish the delivery of a gift from father to child than as between persons not related: *Love v. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 843. It has been held that a valid gift of a promissory note payable to the order of the donor may be made by delivery merely, without indorsement or other writing: *Note to Pope v. Burlington Sav. Bank*, 48 Am. Rep. 789. But see *Beatty v. Western College*, 177 Ill. 280, 69 Am. St. Rep. 242, 52 N. E. 432.

FLOYD v. NATIONAL LOAN AND INVESTMENT CO.

[49 W. Va. 327, 38 S. E. 653.]

TRUSTEE'S SALE—TRUSTEE'S FEE.—An agreement in a trust deed to secure the payment of a loan that a commission be paid to the trustee for making a sale cannot affect the validity of the loan nor invalidate the notice of the sale. (p. 810.)

MORTGAGE, WHAT IS NOT.—A TRUST DEED TO SECURE THE PAYMENT of a loan and to invest the trustee with a power of sale is not a mortgage. (p. 810.)

FOREIGN CORPORATIONS—RULE OF COMITY IN FAVOR OF.—A corporation created in one state has no power to do business in another, except by the law of comity, but this rule of comity extends to, and is enforced by, the courts in every nation and every state of the Union until destroyed by the law-making power. (p. 810.)

FOREIGN CORPORATIONS, IMPLIED POWERS OF IN OTHER STATES.—A corporation, if not forbidden by the laws of its being, may exercise in a state other than that of its creation the general powers conferred by its charter, unless prohibited from doing so by the direct enactments of the latter state or by its public policy, to be deduced from the general course of legislation or from the settled decisions of its highest court. (p. 811.)

FOREIGN CORPORATIONS.—A STATE MAY FORBID AND PREVENT A FOREIGN CORPORATION from carrying on business within its limits, and also from doing certain acts, and making certain contracts within its jurisdiction. The exceptions to this rule are corporations engaged in foreign or interstate commerce or employed in the business of the government of the United States. (p. 811.)

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT. A PRIVATE CORPORATION IS A "PERSON" within the meaning of the fourteenth amendment to the constitution of the United States, but the provision of that amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, does not prohibit a state from requiring "for admission within its limits of a corporation of another state such conditions as it chooses." (p. 812.)

A FOREIGN CORPORATION HAS NO AUTHORITY TO DO IN A STATE OTHER THAN THAT OF ITS CREATION any act not permitted by the laws of such state to individuals generally. (pp. 812, 813.)

A FOREIGN CORPORATION CANNOT EXERCISE, IN WEST VIRGINIA, any greater or different rights, powers, and privileges than are conferred on domestic corporations. (p. 814.)

BUILDING AND LOAN ASSOCIATIONS.—THERE IS A DIFFERENCE BETWEEN A PREMIUM, the amount of which is fixed at the time a loan is made and then divided into installments, and paid periodically, and a premium of a specified sum, to be paid on each share each month for an indefinite and uncertain time, as until the maturity of the stock, and an association authorized to operate upon one of these systems cannot adopt the other without making the contract unlawful. (pp. 818, 819.)

A BUILDING AND LOAN ASSOCIATION GOING INTO ANOTHER STATE TO DO BUSINESS is subject to the restrictions there imposed upon like associations, and if it does business on a plan not sanctioned by such restrictions, it cannot enforce its contract as a building and loan association contract. (p. 820.)

A FOREIGN BUILDING AND LOAN ASSOCIATION CANNOT ENFORCE IN A STATE OTHER THAN THAT OF ITS CREATION a usurious note secured by a trust deed on property in the latter state, on the ground that the contract is to be deemed the contract of the state of the domicile of the corporation, and is there exempt from laws against usury, if the laws of the state where the suit is brought do not permit either individuals or corporations to make or enforce contracts such as that in question. (p. 821.)

BUILDING AND LOAN ASSOCIATIONS, CONDITIONS OF --RELIEF IN EQUITY FROM UNLAWFUL CONTRACTS WITH. One who borrows money from a foreign building and loan association, and enters into a contract with it, forbidden by the laws of the state, and secured by a trust deed of real property therein, and who seeks relief in equity against such deed, must do equity by paying the principal debt with legal interest, subject to credits of money already paid by him, together with any sums paid by the association for taxes, insurance, and other expenses necessary to preserve the property. (p. 825.)

J. W. Kennedy, for the appellants.

Brown, Jackson & Knight, for the appellees.

328 POFFENBARGER, J. On the first day of September, 1894, the plaintiffs by their deed of trust conveyed to the defendant, B. H. Oxley, trustee, certain real estate situated in the city of Charleston, Kanawha county, in trust to secure to the National Loan and Investment Company of Detroit, Michigan, the payment of two thousand five hundred dollars, according to the conditions of a certain bond bearing even date therewith, executed by the plaintiff to said company for the loan of said sum of two thousand five hundred dollars by it made to them, to secure the repayment of any and all sums said company might pay for taxes, insurance, and maintaining the property in repair, in case of the failure of the plaintiffs to make such necessary payments, and to secure the strict performance of all the obligations incumbent upon the said Clara J. Floyd as a shareholder in, and borrower from, said company under its charter, by-laws, rules, and regulations then existing,

or which might thereafter be lawfully made, altered, or amended.

It is recited in this deed that said Clara J. Floyd is the owner of twenty-five shares of stock in said company, and has borrowed of it pursuant to its by-laws the money thereby secured, and by said deed she covenants and agrees to all things required of her to be done by the by-laws of said company as a shareholder and as a borrower, and to pay to said company the sum of one dollar ³²⁰ and forty-five cents per share per month on her stock and loan, that being as stated, stock, interest, and premium; also to pay all fines that should be legally assessed against her, such payments to be made until the stock owned by her should mature under said by-laws, and when it shall have matured or reached the value of one hundred dollars per share, said stock to be surrendered and canceled, and thereupon the deed to be void, and the property thereby granted to be released. Said deed provided that in case of default said trustee, upon the request of the company, should make sale of the property upon the following terms: "(a) For cash in a sum sufficient to pay: 1. The costs of executing this trust, the same to include a commission to said trustee of five per centum upon the gross amount of said sale; and 2. The whole amount then due to said third party according to the terms of this deed, the bond herein mentioned and the by-laws and regulations of said company; (b) and the residue, if any there be, upon such terms as the said trustee or his successor may deem best."

And it was further expressly agreed therein that in case said trustee should sell said premises as provided in said deed by reason of the default of said parties of the first part in computing the amount due said party of the third part, said first parties should be considered and treated the same as a borrowing member of said company.

It was also covenanted and agreed in said deed that all payments herein mentioned should be made at the company's office in the city of Detroit, Michigan, that being the place where the contract therein set forth and the bond therein referred to were made; that the bond and instrument given to secure the payments mentioned in the bond shall in all cases be construed as under and in accordance with the laws of the state of Michigan, and the articles of incorporation and by-laws of said association, any provision whatsoever in the laws of any other state to the contrary notwithstanding, and that any provision in the laws of any other state at variance with

the laws of the state of Michigan, either on the subject of interest, premium, or any other matter, is expressly waived, it being mutually intended by the parties thereto to make the contract in all things as a contract under and in accordance with the laws of the state of Michigan.

330 Under her obligations thus contracted, Mrs. Floyd made sixteen payments, of which the first was in September, 1894, and the last in December, 1896, amounting in all to six hundred and eighteen dollars and twenty-two cents, of which one hundred and twenty dollars were dues on stock, two hundred and twenty dollars interest on the loan, two hundred and forty dollars premium, and thirty-eight dollars and twenty-two cents fines for failures to pay. She having ceased to make payments, the trustee advertised the property for sale for cash in a sum sufficient to pay the costs of executing the trust, including five per cent commission to the trustee upon the gross proceeds of the sale, and the whole amount due said company, three thousand and twenty-two dollars and twenty cents as of the 19th of July, 1897, and the residue to be paid in two equal installments of one and two years, and fixing August 21, 1897, as the day of sale.

On the seventeenth day of August, 1897, the plaintiffs filed their bill of complaint in the cause in the circuit court of Kanawha county, setting forth substantially the foregoing facts, and alleging that said transaction was in substance and in fact a simple loan only, and was put in the form in which it was made under the requirement of the defendant company as a shift and device on its part to avoid the usury laws of this state; that the balance claimed to be due by the defendants on account of said loan is about six hundred dollars more than under the laws of this state it is entitled to on account of said loan, it being greatly in excess of the principal advanced with six per cent per annum interest; that defendant company is entitled only to the balance due on account of said loan, computed upon the principal advanced with six per cent interest, allowing as credits the monthly payments upon the principal of partial payments; that by reason of the covenants and provisions of the deed of trust, for breaches of which authority could not be vested in the trustee to fix the damages, it could not be executed in pais, and though in form a conveyance to a trustee, it is in fact and law nothing but a mortgage, and can be executed and enforced only by judicial decision in a court of equity; that the terms of sale specified in the trust

deed and notice of sale are not such as the law requires in such case, and a sale thereunder would be improper, erroneous, and illegal, and greatly ³³¹ to the prejudice of the plaintiff's rights; that said company has no authority under the laws of this state or the state of Michigan to make the loan in the manner and form in which it was made as hereinbefore alleged, the sole object for which said association was formed, and the only legal authority vested in it, being to afford its members a safe and comfortable investment for their savings and aid them in the purchase and improvement of real estate, and the building and improving of homesteads; that less than nine persons having formed said company, the number required by the laws of this state, it was without authority to make said loan; and that the amount claimed by said company, computed under its by-laws, is greatly in excess of the amount that would be due, computed on the basis of six per cent interest and treating the payments as partial payments made on the debt in the usual way, and is therefore exorbitantly usurious. Copies of the deed of trust and by-laws of the company are filed with the bill as exhibits. The bill prays that the defendants be enjoined from making the sale, and that the court take jurisdiction of the matters in controversy between the parties, and make and enter such decrees and orders as justice and equity may require, and for general relief. The injunction was awarded as prayed for.

The defendant company appeared and demurred to the bill and answered it, admitting the loans and contracts of membership and security, and its attempt to enforce them, as alleged in the bill, averring their legality under the laws of Michigan, and of this state, that it has complied with the requirements of the statute relating to foreign corporations, and that the contract is solvable in Michigan; denying that it is a shift or device to evade the usury laws of West Virginia, and also that the contract is illegal or usurious; that the amount due under it is uncertain, and there is necessity for resort to a court of equity for its enforcement.

To this answer there is no replication, and no depositions or affidavits were taken and filed.

On the fifteenth day of April, 1899, the circuit court dissolved the injunction and dismissed the bill, and an appeal from, and supersedeas to, this decree were allowed.

The allegation that this contract between the parties was not a contract of membership in said association on the part of

³³² Mrs. Floyd, and a loan to her as such member in good faith, but on the contrary a mere shift and device to evade the usury laws of this state, is denied, and there is no replication to the answer, which must be taken as true, but if there were a replication, there is no evidence to sustain the allegation. Upon the face of the papers nothing appears from which such an interpretation can be reached. The corporate existence of the association is admitted, and it is only insisted and objected that it has attempted to make a contract that it has no power or authority to make under the laws of this state or the laws of Michigan. As to the terms of sale, they are exactly as stipulated in the deed of trust, except as to any surplus that may remain after paying the costs of executing the trust, expenses of sale, including an agreed commission, and the amount due the company; and as to this surplus it is covenanted that it shall be upon such terms as the trustee might deem best. In the exercise of this discretion, which the parties were authorized to vest in him, the trustee fixed the terms of sale, as to such surplus, in the notice. The agreement in the deed for a five per cent commission to the trustee could not affect the validity of a loan or invalidate the notice. It does not go to the association nor enter into the loan, nor did it interfere with a prevention of the sale by payment of the debt. If illegal, the trustee could not withhold it on a settlement of his accounts. The allegation of uncertainty in the amount due is denied, not replied to, and no proof offered. As to the character of the instrument, it is clearly not a mortgage, but the ordinary deed of trust to secure the performance of a building and loan contract and loan, such as are common in this state. There is a denial of the allegation of uncertainty as to the amount due, accompanied by an averment of a statement having been rendered to which no exceptions were taken, nor objections made. Besides that, no facts are alleged from which uncertainty appears. In none of these matters does any ground appear upon which the bill or the injunction can be sustained.

There is but one real question in the case, and that is whether this contract made by a Michigan building and loan association with a citizen of this state, to be performed in the other state and secured by deed of trust upon real estate situated in this state, can be enforced here. It involves the question of the ³³³ status in this state of a foreign building and loan association that has complied with the statutory condi-

tions preliminary to its doing business here, and the nature of the contract it can make under such conditions; and this raises as a preliminary inquiry the question of the difference between the rights of individuals and corporations doing business beyond the limits of the state to which they belong.

Except by the law of comity, no corporation created in one state has the power to do business in another. Its very life is the franchise granted by its parent state, and creation of its law, which has no extraterritorial force. It is not entitled under the constitution of the United States to the privileges and immunities of citizens.

"Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 13 Pet. 519: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence even by other states, and the enforcement of its contracts made therein depend purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy": Mr. Justice Field in *Paul v. Virginia*, 8 Wall. 180.

But this rule of comity exists and is enforced by the courts in every nation and every state of the Union, until destroyed by the law-making power. "In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government unless they are repugnant to its policy or prejudicial to its interest": Story on Conflict of Laws, 35.

"We think it well settled that by the law of comity among nations a corporation created by one sovereignty is permitted to make contracts in another, and sue in its courts; and that the same law of comity prevails among the several sovereignties of the Union": Chief Justice Taney in *Bank of Augusta v. Earle*, 13 Pet. 519.

³³⁴ In harmony with the general law of comity obtaining among the states composing the Union, the presumption should be indulged that the corporation of one state, not for-

bidden by the laws of its being, may exercise within any other state the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter state, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court: Mr. Justice Harlan in *Christian Union v. Yount*, 101 U. S. 356.

Any state, however, may forbid and prevent a foreign corporation from carrying on its business within its limits, and also from doing certain acts or making certain contracts within its jurisdiction. "Whenever a state sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made": Chief Justice Taney in *Bank of Augusta v. Earle*, 13 Pet. 519. "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows as a matter of course that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion": *Paul v. Virginia*, 8 Wall. 180.

The only exceptions to this rule are in the cases of corporations engaged in foreign commerce, corporations engaged in interstate commerce, and corporations employed in the business of the government of the United States. "The only limitation upon the power of a state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. Corporations are not citizens within the meaning of the clause of the constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states: ³³⁵ Const., art. 4, sec. 2, cl. 1. A private corporation is included under the designation of 'person' in the fourteenth amendment to the constitution, section 1. The provisions in the fourteenth amendment to the constitution,

section 1, that 'no state shall deny to any person within its jurisdiction the equal protection of the laws,' do not prohibit a state from requiring for the admission within its limits of a corporation of another state such conditions as it chooses": *Pembina Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. Rep. 737. In reaching these conclusions the court says: "The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax, it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more. The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation, that other states may be willing to admit within their jurisdiction, or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states, the latter may wish to limit the number of such corporations or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character."

Under the law of comity, which exists in every state, until repealed, and which the courts must, as well as may, enforce, a foreign corporation has no authority to do any act in a state other than that of its being which is not permitted by the laws of such state to individuals generally. The law of comity merely enables a body of corporators chartered by one state to act in a corporate capacity in another state, subject to all the laws ³³⁶ and regulations of the latter: *Morawetz on Corporations*, sec. 964, citing numerous cases.

From these authorities it is plain that any foreign corporation may do business in this state unless prohibited by law, or its business be such as is repugnant to our laws or the public policy of the state, "to be deduced from the general course of

legislation or from the settled adjudications of its highest court," and may do such acts in the state as are permitted by its laws to individuals generally, and no others. But such prohibition or repugnancy will not be implied from the mere silence of the state. "If the policy of a state or territory does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations or allows corporations to be formed only by general law": *Cowell v. Springs Co.*, 100 U. S. 59.

The legislature of our state has not been silent on this subject. It has prescribed certain requirements to be complied with as conditions precedent to the right of all foreign corporations to do business in the state, and inserted therewith the following clause: "Any corporation duly incorporated by the laws of any state or territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold property and transact business in this state, upon complying with the requirements of this section, and not otherwise": Code, c. 54, sec. 30. This is equivalent to saying that "no corporation duly incorporated by the laws of any state or territory of the United States, or the District of Columbia, or of any foreign country, unless it be otherwise expressly provided, shall hold property and transact business in this state without having first complied with the requirements of this section." In one sense it is a prohibition against foreign corporations, and repeals the general law of comity, but it admits all foreign corporations except those expressly forbidden to the right to hold property and transact business in the state upon compliance with the requirements.

There is no statute expressly prohibiting foreign building and loan associations from doing business in the state. They are ³³⁷ not excluded, and such of them as comply with the statutory requirements are admitted.

The bill alleges that the appellee here has not complied with them. This allegation is denied in the answer accompanied with an averment that it has complied with them. To this there is no replication. The answer must therefore be taken as true.

This Michigan corporation being thus authorized to do business in this state, its courts would not, in the absence of any further legislation, restrain it from doing any act permitted by its laws to individuals generally, and could not refuse to compel, at its instance, the performance of any contract thus lawfully made with it; and if, under such circumstances, it made a contract with a citizen of this state, to be performed in the state of Michigan, and such contract were authorized by its charter and the laws of the state of its being, it would be enforceable here, although the rate of interest provided for and lawful in Michigan were higher than the legal rate here. But the legislature has given further expression to its will respecting foreign corporations, thus: "Such corporations so complying shall have the same rights, powers, and privileges, and be subject to the same regulations, restrictions, and liabilities that are conferred and imposed by this and the fifty-second and fifty-third chapters of this code, and by chapter 20 of the acts of 1885, on corporations chartered under the laws of this state": Code, c. 54, sec. 30.

Can there be any doubt that the effect of this provision is to permit foreign corporations to have the same rights, powers, and privileges that are conferred upon domestic corporations, and no greater or different rights, powers and privileges? If that is not its meaning, what can be the legal effect of the clause, "subject to the same regulations, restrictions, and liabilities that are" imposed upon domestic corporations? Clearly, it must operate as a prohibition upon the exercise by a foreign corporation of any greater or different rights, powers, and privileges than are permitted to domestic corporations. Similar provisions occur in the statutes of several of the states, and in the constitutions of some of them; but many states have no such provision. It occurs in the Illinois statute in this form: "Foreign corporations and the officers and agents thereof, doing business in this state, shall be subject to all the liabilities, restrictions, and duties that are ³³⁸ or may be imposed upon corporations of like character organized under the general laws of this state, and have no other or greater powers."

In *Stevens v. Pratt*, 101 Ill. 206, the court, in construing the provision, held: "It is simply a law imposing regulations and restrictions, and its meaning is that where the general laws of this state provide for the organization of corporations, foreign ones of like character doing business in this state shall exercise no greater or different powers, and shall be subject

to the same liabilities, restrictions, and duties." Mr. Justice Schofield, in delivering the opinion of the court, said: "The manifest and only purpose was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law." Our statute is equivalent to that of Illinois, and must have the same meaning. That being its effect, a foreign corporation can do no act, make no contract, and exercise no power in this state not permitted to like corporations organized under the laws of this state. The exercise by such corporation of any power not possessed by a similar domestic corporation would be repugnant to the public policy of the state as expressed in this statutory provision, and for that reason would be restrained by the courts of this state. We only recognize and give effect to the corporate existence of the foreign company, not to all the powers which, by its charter and the laws under which it exists, it has and may exercise in the domiciliary state. It will be permitted to exercise here only such of its powers as are not repugnant to our laws and policy. Such is the effect given the Illinois statute by the courts of that state in determining the rights of foreign building and loan associations.

In *Granite State Providence Assn. v. Lloyd*, 145 Ill. 620, 34 N. E. 142, it is held: "Under section 26, chapter 32 of the Revised Statutes, where a foreign corporation of any kind comes into this state to transact business, it must conform to the law of this state, if it exists, regulating similar corporations organized under the general laws of this state. Foreign corporations doing business in this state are placed on an equality with domestic corporations to the extent that they shall exercise no greater or different powers, and are made subject to the same regulations and restrictions, and governed by the same rules of law in these respects. . . . A foreign corporation doing ³³⁹ a homestead and loan business in this state will be governed by the laws of this state as to the right of a stockholder to withdraw."

In *Rhodes v. Missouri Sav. etc. Assn.*, 173 Ill. 621, 50 N. E. 998, it is held that: "In order that a foreign building and loan association may enforce in our courts a contract which would be usurious unless within the exemption given by our statute to local building and loan associations, it must appear that the statute under which such foreign association was organized is identical with or substantially like our own statute." In

the first of these cases, the Illinois courts compelled the foreign building and loan association to be governed by the statute of that state in respect to its settlement of the withdrawal value of its shares. In the other, the foreign association was denied the character, rights, and powers of a building and loan association because it appeared from its by-laws that it was not organized and doing business in the method prescribed by the state laws for such associations. Its loan to the resident member was therefore treated as a simple ordinary loan in respect to its settlement, and it was only permitted to take the money advanced, with legal interest, after crediting the money paid into the association by the borrowing member.

In *Freie v. Fidelity etc. Union*, 166 Ill. 128, 57 Am. St. Rep. 123, 46 N. E. 784, the court held: "A corporation created in another state may, upon the principle of comity, exercise within this state the powers conferred by its charter, if not inconsistent with the law or against the public policy of this state. A foreign building and loan association doing business in this state may contract for premiums and fines in addition to legal interest on money loaned on stock when so authorized by the laws of the state of its creation, without violating the usury statutes of this state."

In the opinion in this last case it is said: "By the statute of Indiana, under which complainant was organized, it had power to enter into the contract in this case, and it was not contrary to the laws or policy of this state which permit the organization of like corporations with the same powers."

Relying principally upon these cases, the law is laid down as follows in section 8797, volume 7, of Thompson's *Commentaries on the Law of Corporations*: "Where a building association undertakes to do business in a state other than that of its creation, whilst a contract made by it in the former state, sanctioned by the statute under which the society was organized, will not be deemed unlawful in the state ³⁴⁰ in which it was made and is sought to be enforced, when it would not be so if made by an association of that state, yet such an association acts and does business in such state (even when duly licensed) subject to its laws and regulations as applied to its own domestic associations by virtue of its statutes and decisions, and will not be permitted to have or exercise any greater or different powers than, but to be held to the same liabilities, restrictions, and duties as, domestic ones. Under this view, moreover, it is deemed legitimate to test the char-

acter of a foreign corporation assuming to act as a building association, by reference to the laws of the state in which it so assumes to act, and to deny it that character, if, by such comparison, its nature and powers are found to be different from, and in excess of, what the laws and policy of that state recognize as belonging to such associations, with the result that contracts, permitted to such associations but unlawful to others, will not be accepted as valid when set up by foreign associations, not properly classible as building associations according to that criterion."

The same principle has been applied by other courts in other cases. In *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519, it was held that although a foreign corporation doing business in the domestic state may by contract, when no domestic statute prohibiting it intervenes, make the law of the state of its incorporation the applicatory law of the contract, yet where the laws of the domestic state prohibit foreign corporations from making certain kinds of contracts they can act only in accordance therewith: 13 Am. & Eng. Ency. of Law, 2d ed., 841, note.

In *Canada Southern R. R. Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. Rep. 363, it was said: "A corporation of one country may be excluded from business in another, but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken both by the government and those who deal with it as a creature of the law of its own country and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation." In that case the question was the validity of a release of a Canadian corporation from part of its bonded indebtedness by a proceeding in the nature of bankruptcy under legislation of the Canadian parliament, there being no limitation there upon the right to impair the obligation of contracts.

On the subject of the incorporation of building and loan associations, ³⁴¹ their methods of business and their rights, powers, and privileges, this state is not without legislation and it is insisted that in seeking the enforcement of its contract with the appellants, the appellee is claiming a right and power not permitted to domestic associations, because it has departed from the requirements of the statute in the nature of the contract it has made. This alleged departure refers to the premium bid for the right of precedence in taking the

loan. Section 26, chapter 54 of the code provides that: "Every such association shall have the power to provide by its by-laws for selling to the stockholders who shall bid the highest premium therefor the money in the treasury, or, in default of bidders at or above a minimum premium, may award to a member the value of any shares held by him less such minimum premium, the minimum premium and the mode of making the award to be fixed by the by-laws. Or such association may charge and receive the premium bid by a stockholder for the priority of right to such loans, in periodical installments; but the by-laws of every association shall set forth whether the premium bid for the prior right to such loan shall be deducted therefrom in advance, or be paid in periodical installments."

The by-laws of the appellee under which the contract in the case at bar was made provide that: "The amount of premium bid shall be taken out of the amount borrowed, but it is expressly provided that, after the 15th of September, A. D. 1891, borrowers competing for loans from this company shall bid as a premium a stated amount per share, payable monthly on the last Saturday of each month. Said stated amount per share per month to be paid each month during the existence of the shares of stock borrowed upon."

There is a difference between a premium, the amount of which is ascertained and fixed at the time the loan is made, and then divided into installments and paid periodically, and a premium of a certain sum to be paid on each share each month for an indefinite and uncertain length of time. The former arrangement is plainly contemplated and required by our statute; the latter is provided for in the appellee's by-laws, and embodied in its contract with said appellant. When this monthly payment of premium will end depends upon the date of the maturity of stock, and is, therefore, uncertain. The difference between them is that the amount of premium under a contract authorized by the law is certain in amount, while in the contract here it is ³⁴² uncertain in amount, making a difference in liability on the borrower's part and involving the exercise of a different power on the part of the association from what are permitted in such cases by the law of this state to domestic associations.

The stock of the association upon which this advance was made is its installment stock of class "B," and the payments on it are "to continue each month until such shares shall have

reached the par value of one hundred dollars each as shown by the report of the auditing committee," and as long as the shares run the premium must be paid. The time to run being uncertain, the amount of premium to be paid is uncertain also.

The difference between the results under the two systems is said to be slight. In Thompson on Corporations, section 8779, it is said: "The essential nature and purpose of the premium are the same in both of these systems, and their practical operation substantially alike. In neither case is the premium paid; the borrower simply promises to pay it. . . . Except where the premium consists simply in an increased rate of interest, it is not contemplated that it shall be paid dollar for dollar, by the borrower, in strict conformity with the letter of his undertaking. All he is bound to do is to pay the periodical amounts coming due upon his obligation, and to continue doing so until the shares of the society or series to which he belongs have reached maturity; then his debt and premium bid are both discharged by relinquishing to the association his credit in the same. Unless the society is unfortunate, this period will be reached a considerable time before the borrower's payments, with interest, shall amount to the aggregate of what he received, with interest, together with what he promised to pay by way of premium. The period for ascertaining the amount of the premium actually paid by the borrower is the date of the maturity of the shares and distribution of assets."

However the books say, and courts have held, that where an association is authorized by statute to operate upon one of these systems respecting the premium, it cannot adopt the other without making the contract unlawful to the extent of the excess of the reservation above the legal rate of interest: *Endlich on Building Associations*, secs. 407, 408; *Mechanics' etc. Assn. v. Wilcox*, 24 Conn. 147; *Mechanics' etc. Assn. v. Meriden Agency Co.*, 24 Conn. 159; *Birmingham v. Maryland etc. Assn.*, 45 Md. 541; *Geiger v. Eighth German etc. Assn.*, 58 Md. 569; *White v. Williams*, 90 Md. 719, 45 Atl. 1001; *Gray v. Baltimore etc. Assn.*, 48 W. Va. 164, 37 S. E. 533.

343 The care which the legislature has taken to state explicitly the plan upon which such associations may operate, and the means it has adopted to compel adherence to it, indicate that the law-making power of the state deems it important. The law relating to the subject of building associa-

tions is contained in four sections of the chapter, followed by these words: "Every such association shall adopt by-laws, which shall embrace all the provisions of the four preceding sections, and such further provisions for its government and the management of its business, not inconsistent with these sections, as it may deem proper."

No departure from the method of doing business thus prescribed is allowed. There can be no question as to the legislative intent to compel absolute adherence and obedience to its plan for conducting the operation of these societies. Further evidence of this is found in the radical change effected in the law by chapter 58, Acts of 1883, by which the present law came into existence. Prior thereto the provision relating to premiums was: "Every such association is authorized to levy, assess, and collect from its members such sums of money, by stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans as the corporation by its laws shall provide." And this change came immediately after the decisions of this court in *Pfeister v. Wheeling Bldg. Assn.*, 19 W. Va. 676, *McGannon v. Central Bldg. etc. Assn.*, 19 W. Va. 726, *Parker v. United States etc. Assn.*, 19 W. Va. 744, *Parker v. United States etc. Assn.*, 19 W. Va. 769, and *Haigh v. United States etc. Assn.*, 19 W. Va. 793, by which the building association statutes of the state were construed and applied to the transactions of said societies.

Measured by the standard of our statute this association is found by the method of its operations and the nature of its contracts not to have the character of a building association and cannot, therefore, be permitted to enforce its contract as a building association contract. It is contravened as such by the policy of the state, and is therefore not within the law exempting such associations from the usury laws, unless there is some other principle or ground upon which it may be permitted to collect the money for which it has contracted.

Counsel for the appellee insist this contract is made and to be performed in the state of Michigan and is valid by the laws of that state, and that therefore the *lex loci contractus* controls it. This position would be unassailable if the appellee were a natural ³⁴⁴ person insisting upon the right to enforce a contract solvable in the state of Michigan, and carrying the legal rate of interest of that state. But it is not. It is a building association, a corporation, clothed with special

privileges, among which is exemption from the usury laws of its own state. The general law of comity under which, it is contended, it might have carried such special powers and privileges into, and exercised them in, this state, in the absence of any public policy on the part of this state to which their exercise here would have been repugnant, has been expressly repealed. But the law of comity only permits corporations to do in a foreign state such acts as individuals are permitted to do, and it may well be doubted whether a corporation exempted from the usury laws of its own state could carry that exemption into and assert it in the courts of another state, a thing that is permitted to no individual in any country, and may be deemed, therefore, to be against public policy everywhere.

The cases of *Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268, *Pugh v. Cameron*, 11 W. Va. 523, *Wilson v. Lazier*, 11 Gratt. 447, *Findlay v. Hall*, 12 Ohio St. 610, *Shipman v. Bailey*, 20 W. Va. 140, *Tolman v. Read*, 115 Mich. 71, 72 N. W. 1104, *Sawyer v. Dickson*, 68 Ark. 71, 48 S. W. 903, *De Walk v. Johnson*, 10 Wheat. 383, cited by counsel for appellee, are all cases of contracts payable to natural persons, solvable in foreign states and conformable to the general laws of those states respecting the matter of interest. In none of them was a special rate of interest permitted by the foreign state, only to a certain class of corporations, whose existence need not be recognized beyond its own territorial limits, recognized or enforced.

Two cases are cited, however, in which the position taken here by the appellee is upheld: *Building etc. Assn. v. Logan*, 66 Fed. 827, and *Bennett v. Eastern Bldg. etc. Assn.*, 177 Pa. St. 233, 55 Am. St. Rep. 723, 35 Atl. 684; but in neither of these cases was the fact that the building association was setting up and claiming, under the law of comity, an exemption from the general law of their own respective states, and not the laws themselves—special privileges permitted to them by their states, but denied to natural persons. Other cases of the same class might have been cited: *National Mut. Bldg. etc. Assn. v. Ashworth*, 91 Va. 706, 22 S. E. 521; *Ware v. Bankers' etc. Co.*, 95 Va. 680, 64 Am. St. Rep. 826, 29 S. E. 744; *Baltimore Bldg. etc. Assn. v. Titlow*, 19 Pa. Co. Ct. 518; *Equitable Bldg. etc. Assn. v. Hoffman*, 50 S. C. 303, 27 S. E. 692; *Turner v.* ³⁴⁵ *Interstate etc. Assn.*, 51 S. C. 33, 27 S. E.

947; Pollock v. Carolina etc. Assn., 51 S. C. 420, 64 Am. St. Rep. 683, 29 S. E. 77.

In support of the position taken here Morawetz on Corporations, section 964, is re-cited. The law there is stated thus: "A corporation has no implied authority to do any act in a foreign state which is not permitted by the laws of the latter to individuals generally. The law of comity merely enables a body of corporators chartered by one state to act in a corporate capacity in another state, subject to all the laws and regulations of the latter." Again, section 967, same work, it is said: "It is the charter alone which is recognized by the law of comity and not the general legislation of the state in which the corporation is formed. The word 'charter' is here used to signify the agreement between the shareholders of the corporation, whether this agreement be contained in a special act of the legislature, or in articles of association, or in either of these taken in connection with certain general laws of the state."

In *Bard v. Poole*, 12 N. Y. 495-505, we find this: "It is, of course, implied that the contract must be one which the foreign corporation is permitted by its charter to make; and it must also be one which would be valid if made at the same place by a natural person, not a resident of the state": See, also, *McGregor v. Erie Ry. Co.*, 35 N. J. L. 115; *Bank of Augusta v. Earle*, 13 Pet. 539; *Stetson v. City Bank*, 2 Ohio St. 174; *Lewis v. Bank of Ky.*, 12 Ohio, 132, 40 Am. Dec. 469.

Would the courts of any state permit an individual of another state to enforce a contract in violation of the usury laws of his own state? Comity recognizes only the general laws of the foreign state, not the local exemptions from, or exceptions to, such laws.

But there is another reason why these authorities cannot be accepted here. It does not appear in any of these cases that, in the states in which they were decided, the legislatures have placed foreign corporations under the same regulations, restrictions, and liabilities, and conferred upon them only the same rights, powers, and privileges that are imposed and conferred upon corporations existing under their own laws. There are either no declarations in those states of public policy forbidding the exercise there by foreign corporations of powers greater than, or different from, the powers permitted to their corporations, ³⁴⁶ as in this state and in Illinois, or

the courts have failed to pass upon the very important question whether they shall be applied or not applied. Nor does it appear from these cases that in all instances the building and loan contract involved was in conflict with the domestic law governing such contracts. A contract by such an association of another state, not in conflict with our building association statute, would be enforced here, not by virtue of the general law of comity, but because our law makes the status of such a foreign association the same as that of our own associations and gives it the same rights, powers, and privileges, and remedies, in respect to its contracts, although for many purposes it remains a foreign corporation.

If the powers they assume to exercise are the same as, or within and not beyond, those permitted to our own associations, they are enforceable; otherwise they are not.

Another contention against the position taken in this opinion is that the premium reserved in this contract is certain in a legal sense—that under the Michigan law the stock has a fixed maximum limit for its maturity, viz., such period as will permit the stock dues to equal the face of the shares, but liable to be shortened by application of dividends; and therefore, upon the principle that that is certain which can be made certain, our statute is not violated. In other words, if the monthly dues are fifty cents per share, and the shares one hundred dollars, the stock must mature in sixteen and two-thirds years, without any accumulation of profits, and the period required for maturity will be less than that, according to the amount of the earnings over expenses and losses.

Our statute requires no precedent certainly as to the stock dues, and in that respect it is like the Michigan statute. But as to the premium it must be so fixed in advance that the borrower can know exactly how many dollars he is to pay on account of premium, how much of his money is to go into profits or losses of the company, and not become a direct credit upon his loan. He is entitled to credit upon his loan for every dollar he pays in as dues. He will receive credit on his loan for but an infinitesimal part of what he pays in as premium, and if the concern's losses equal its profits he receives none of it. That there is no such certainty in this contract is indisputable. That our statute requires such certainty is undeniable whether in its operation it produces it in all cases or not.

347 While this contract cannot be enforced according to its terms it is not so unenforceable because of its want of equity between the borrower and investor, which is perhaps no greater than might occur in an association conforming to our statute, as we set no limit upon the ratio between dues and premium from which this inequitable result flows; nor because, under the contract, the amount now due from the appellant is far beyond the amount she borrowed, an inevitable result in every building association contract in which default continues for a long time; nor because of any improper motive on the appellant's part, or of the agents of the association in entering into it, for there is not a scintilla of evidence of that in the nature of the contract or elsewhere in the record; but simply because it is such a contract as is clearly repugnant to the public policy of the state, plainly written in its legislation, and, therefore, prohibited as to all building associations.

But the appellant has received two thousand five hundred dollars from this association and secured the performance of her said contract by a deed of trust upon her real estate, and she comes into court to have the lien released, offering to pay the principal of the debt with legal interest thereon, subject to credit for the money she has already paid in. This, together with any sums paid out by the appellee upon taxes, insurance, or other expenses necessary to preserve the property, constitute a lien upon the property and must be satisfied, as in seeking equity the appellant must do equity.

For the reasons herein stated, the decree must be reversed and the cause remanded for further proceedings according to the principle herein laid down, and further according to the rules and principles governing courts of equity.

Foreign Corporations do not come into a state as a matter of right, but only by comity, and such corporations are subject to the same restrictions and duties as domestic corporations, and have no greater powers: *Harding v. American Glucose Co.*, 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577. See, in this connection, *Dearing v. McKinnon etc. Hardware Co.*, 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773; *Bank of China etc. v. Morse*, 168 N. Y. 458, 85 Am. St. Rep. 676, 61 N. E. 774. Foreign corporations have no absolute right to recognition in a state. They may be admitted on such terms and conditions as the state may impose, or they may be excluded altogether: *State v. Schlitz Brew. Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. 519. Or the state may discriminate in the privileges it may grant to such corporations as a condition of their doing business within its limits: *Scottish etc. Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665.

Corporations are Persons to whom the equal protection of the laws must not be denied: See the monographic note to *State v. Goodwill*, 25 Am. St. Rep. 873; *Pittsburgh etc. Ry. Co. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 300, 49 N. E. 582. But consult *Hawley v. Hard*, 72 Vt. 122, 82 Am. St. Rep. 922, 47 Atl. 401.

A Building and Loan Association organized in one state and doing business in another is permitted therein to charge no higher rate of interest than is chargeable under the laws of the latter state. And while by the law of comity the charter of such corporation is recognized as the law of its existence, yet if it employs the usual agencies to solicit and transact business in the latter state, and contracts for the payment of premiums and interest in excess of the authorized rate, the transaction must be denounced as an attempted evasion of the laws of that state, whatever may be the nominal rate specified or artifice adopted. And this, though it is specifically provided that the contract is made with reference to the laws of another state: *Shannon v. Georgia State Bldg. etc. Assn.*, 78 Miss. 955, 84 Am. St. Rep. 657, 30 South. 51. A loan made in this state to a citizen thereof by a foreign building and loan association, which is secured by a mortgage on land here, is a contract of this state. And it must be construed according to its laws, notwithstanding a stipulation in the mortgage to the effect that it is a contract of another state: *Washington Investment Assn. v. Stanley*, 38 Or. 319, 84 Am. St. Rep. 793, 63 Pac. 489. See, also, *National etc. Loan Assn. v. Burch*, 124 Mich. 57, 83 Am. St. Rep. 311, 82 N. W. 837; *Meroney v. Atlanta etc. Loan Assn.*, 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924. Compare *Hale v. Cairns*, 8 N. Dak. 145, 73 Am. St. Rep. 746, 77 N. W. 1010.

RHOADES v. CHESAPEAKE AND OHIO RAILWAY CO.

[49 W. Va. 494, 39 S. E. 209.]

CONTRACT FOR PERMANENT EMPLOYMENT, WHAT IS AND WHEN VALID.—The agreement of an employer in consideration of a release by an employé, in whole or in part, of a claim for damages, that the former will employ the latter and give him a steady job so long as he gives satisfaction, is not void for want of mutuality. On the side of the employé it is an executed contract, not of the service contemplated, but as to the opportunity to serve and receive wages therefor. (p. 831.)

AGREEMENT, DISCHARGE OF EARLIER BY LATER.—If two agreements of different dates, between the same parties, and covering the same subject matter, are inconsistent, the earlier is discharged by the later, but if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together. (pp. 834, 835.)

CONTRACT FOR PERMANENT EMPLOYMENT—DAMAGES FOR VIOLATION OF.—If one who has contracted for permanent employment is "discharged without cause, he may treat the contract as absolutely broken by the master, and, in an action thereon, recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, less

any sum he might have earned already or might thereafter earn in other service, as well as the amount of any loss the defendant sustained by the loss of his services without the master's fault."*

EVIDENCE, BURDEN OF PROOF.—In an action by an employé who claims to have been discharged without sufficient cause "the burden is upon the defendant to show that the discharge was for good cause, and a verdict for the plaintiff should not be set aside, unless it is clearly wrong."

JURY TRIAL—INSTRUCTIONS.—"An instruction stating the law applicable to one theory of the case, and substantially covering all the facts upon which the correctness of such theory depends, is proper, if there is any evidence in the case tending to prove such facts, although it ignores other facts put in issue as part of another and different theory, which, if true, leads to a different conclusion and result, when another instruction has been given in the case covering such conflicting theory."

Simms & Enslow, for the plaintiff in error.

E. W. Wilson, for the defendant in error.

495 **POFFENBARGER, J.** On or about November 7, 1896, G. W. Rhoades, then employed as a section hand by the Chesapeake and Ohio Railway Company, received an injury, while assisting in replacing on the track a derailed freight-car on the Cabin Creek branch of said railroad, which necessitated the amputation of one of his legs, on the twenty-seventh day of December, following. Soon after he was discharged from the hospital, negotiations for a settlement with him were commenced by the claim agent of the railway company, which resulted in the preparation by said agent, and signing by Rhoades, of the following instrument:

"Coalburg, W. Va., April 27, 1897.

"I hereby agree to accept six hundred dollars in full settlement, satisfaction and discharge of all claims arising from or growing out of personal injuries, received by me on or about Nov. 7, 1896, while working as a laborer at wreck at Dry Branch on Cabin Creek, in the service of C. & O. Ry., said amount to be paid without delay by voucher through agent at Charleston, W. Va. In addition I am to be given a job as watchman or in other service which I can perform. It being understood that I stand in same relation to the company as any other employé injured or not injured and will be removed

*The words in quotation marks in this and the two succeeding paragraphs are copied from the syllabi of the decision as prepared by the judge who wrote the opinion, and the points thus represented by him were doubtless intended to be affirmed by him and the other members of the court, though we cannot find that they are anywhere directly expressed in the opinion.

only for cause and will have a ⁴⁰⁰ steady job so long as I give satisfaction to the foreman or superintendent under whom I work.

(Signed) "G. W. RHOADES."

It was left in the possession of Rhoades, and the agent said he would talk with the superintendent upon his return to Huntington and if he agreed to the terms of the proposed settlement, a voucher would be sent to Charleston and the amount paid. He found the adjustment satisfactory to the superintendent, who directed him to prepare a voucher for the amount. Not having a copy of the writing upon which he and Rhoades had agreed, and wishing to embody its terms in the voucher, the agent relied upon his memory in the preparation of the voucher, which he claims Rhoades signed, May 1, 1897, and which is as follows:

"Chesapeake & Ohio Railway Company, 139,634. Claim No. 2997.

"To George W. Rhoades, Dr.

"1897

Address, Charleston, W. Va.

"April 26th. For amount agreed upon in full settlement, satisfaction and discharge of all claims or cause of action arising from or growing out of personal injuries received by me on or about Nov. 7, 1896, while on duty as laborer at Dry Branch at Drainment of train 113 on Cabin Creek branch.....\$600

O. K.

| Charge to | Amount | Certified | Approved |
|-----------|----------|---------------|----------|
| Hun. Div. | \$600.00 | J. W. Winget, | |
| C. T. 52 | | Claim Agent. | |

"Received, Charleston, W. Va., May 1st, 1897, of the Chesapeake and Ohio Railway Company the sum of six hundred dollars in full compromise, satisfaction and discharge of all my claims or causes of action and particularly of all claims or causes of action arising out of the personal injuries received by me, Nov. 7, 1896, as per above voucher in addition to this I am to be given an opportunity to work for the company under like conditions and circumstances as any other employé injured or not injured so long as I give satisfaction to the foreman or superintendent under whom I work.

"GEORGE W. RHOADES. [Seal]

"J. W. WINGET,

"L. H. MOSEMAN,

"Witnesses."

The six hundred dollars were paid at the Charleston office of the company on or about May 1, 1897, and on that occasion Winget, ⁴⁹⁷ the claim agent, called upon Rhoades for a copy of the writing of April 27, 1897. It being produced and a copy taken on the company's letter-press, the agent took said copy with him. It was attached to and returned with the other papers. Rhoades swears he never signed the voucher of May 1st, but Winget and Moseman, the subscribing witnesses, testify that he did.

On June 1, 1897, Rhoades went to work for the company in pursuance of their agreement, and, for about nine months thereafter, was kept busy at tamping ties, grassing the track, tightening bolts, and watching at a cut near the town of Milton. Then the company not requiring a watchman at said cut any longer, he was sent to Hinton to tend the switches in the yard. He refused to do this work on the ground that he could not perform it, owing to the distance between the switches being so great that he could not travel it in the limited time permitted. He was then brought back to Milton, where he worked a while longer grassing the track and tightening bolts. In the month of July, 1898, he was discharged. He claims he was unable to do the work required of him at that time. As to the character of this work, Clifford, the foreman, says: "Spencer [supervisor of track] told me and I told him [Rhoades] that he would have to tighten up bolts and raise low joints, for me to give him a beat. I gave him about a mile and a half of bolts to tighten up and about a quarter of a mile of grassing to do. Well, he done that piece of grassing all right and worked some at the bolts, and I asked him to go to the east end—the east end of the section—and he refused." That was about three miles from where he had been working. Clifford further describes the work as follows: "It is putting in bolts, tightening up bolts, and where ties are churning at the ends, picking away from the end and letting the water out, throwing up gravel, grassing, and such work as a watchman generally does."

Spencer's statement, relating to the dismissal of Rhoades, is as follows: "There was a few joints in the cut near where Mr. Rhoades lives—I don't suppose they were farther from his door than from here across the street. I wanted him to go there and help the watchman take them up, because I didn't want to take a gang over there. Well, the foreman came to me, and told me that he said he wouldn't do it. Mr.

Rhoades met me the next morning at Milton, and says to me, 'What is it that you want me to do?' I says, 'Didn't the foreman tell you?' 'Yes,' he said. ⁴⁹⁸ 'He told me that he wanted me to carry ties and put in ties.' Says I, 'Mr. Rhoades, I don't think that he told you that. What is it?' 'Well, he wanted me to help raise the lower joints.' 'That is it exactly. I can't get a gang over there now, and then something else will turn up.' He says, 'I am not going to do it.' I says, 'Are you going to quit?' He says, 'No, I am not going to quit.' He says, 'If you want me to quit, discharge me.' I says, 'I will discharge you in fifteen seconds,' and I did it right there."

Rhoades says that after he was given the beat, he grassed the track and tightened part of the bolts, and then they stopped him and wanted him to work on the section, "tamp ties, put in ties, and do general repairing."

Soon after he was discharged, Rhoades brought an action of assumpsit in the circuit court of Kanawha county, against the company, upon the agreement of April 27th, laying his damages at ten thousand dollars. A demurrer, interposed by the defendant, being overruled, a plea of nonassumpsit was entered and issue was joined thereon and a trial was had, resulting in a verdict of one thousand dollars for the plaintiff. A motion to set aside the verdict and grant a new trial was made and overruled and an exception taken to this as well as several other rulings of the court, and judgment was rendered on the verdict.

The overruling of the demurrer is made the basis of the first assignment of error. Under this head, it is argued that the paper, dated April 27, 1897, is not a contract of employment, but at most a mere agreement to make such a contract in the future, because it leaves for future determination the wages to be paid, the kind of work to be performed, and the term or period of employment. It is also said that the declaration is founded wholly upon that paper and does not go beyond it, but it is found that in the declaration the substance of the agreement is alleged, and further that afterward the "defendant ratified and confirmed said agreement and paid to the plaintiff the said sum of six hundred dollars, and gave to the plaintiff a job as watchman on its said railway, said job commencing, to wit, about December 1, 1897, at the price of one dollar per day as wages as such watchman and continuing plaintiff as such watchman from the date last

aforesaid until, to wit, the eleventh day of July, 1898." The declaration thus makes out a complete contract, certain and definite in all respects. It also alleges a breach of this contract, and so establishes a cause of action. It is contended, however, ⁴⁹⁹ that under such a contract, the plaintiff below having the right to stop work when he pleased, the railway company could discharge him.

This view of the contract, declared upon, is not in harmony with the law as expounded in the text-books and decided cases. In Beach on Contracts, section 457, it is said; "When an employé, in consideration of an agreement on the part of the employer to give him work as long as he is able to perform it, releases a claim for damages, said to have been caused by the employer's negligence, the agreement is not void because lacking mutuality. By releasing his claim, the employé has paid in advance for an optional contract, and he has the right to have it remain optional." In Smith v. St. Paul etc. Ry. Co., 60 Minn. 330, 62 N. W. 392, Collins, Judge, says: "The consideration for the defendant's agreement to employ was paid by the release of the plaintiff's claim for damages quite as much and as effectually as if the plaintiff had actually paid cash. By releasing his claim for damages, the plaintiff paid in advance for the privilege or option of working for the defendant." This is cited in support of the text in Beach. It is true the same author says, at section 75, cited for defendant: "A memorandum reciting the terms of a contract of employment which are, however, 'subject to the conditions and regulations of a contract which is to be substituted for the memorandum' imposes no legal obligation." But this in no way conflicts with what is said in section 457, and its utter inapplicability to the case stated in the declaration, as well as to the terms of the paper dated April 27th, is clearly apparent. Section 75 evidently relates to an agreement to give employment, not made upon a valuable consideration, but in which there are simply concurrent promises, the one being the consideration for the other and the terms and conditions of these promises not complete. The paper declared upon here shows upon its face a consideration valuable in law. On the side of the employé, it is an executed contract, not of the service contemplated, but as to the opportunity to serve and receive wages therefor. By his release he has paid for this option. Moreover, this paper contains no qualifying or lim-

iting clause, such as is found in the case put in said section 75.

It is true that the case of *Tennessee etc. R. R. Co. v. Pierce*, 81 Fed. 814, cited for defendant, sustains its position, but that case went up to the supreme court of the United States 500 and was there reversed: See *Pierce v. Tennessee etc. R. R. Co.*, 173 U. S. 1, 19 Sup. Ct. Rep. 335. The facts in the case and the law there declared are stated in the syllabus as follows: "An agreement in writing between a mining company and a machinist stated that while in its employ he was seriously hurt under circumstances which he claimed, and it denied, made it liable to him in damages; that six months after the injury, both parties being desirous of settling his claim for damages, the company agreed to pay him regular wages and to furnish him with certain supplies while he was disabled, and carried out that agreement for six months, at the end of which, after he had resumed work, it was agreed that the company should give him such work as he could do, and pay him wages as before his injury, and this agreement was kept by both parties for a year; and then, in lieu of the previous agreements, a new agreement was made that his wages 'from this date' should be a certain sum monthly, and he should receive certain supplies, and he on his part released the company from all liability for his injury and agreed that this should be a full settlement of all his claims against the company. Held, that the last agreement was not terminable at the end of any month at the pleasure of the company, but bound it to pay him the wages stipulated, and to furnish him the supplies agreed, so long as his disability to do full work continued; and that, if the company discharged him from its service without cause, he was entitled to elect to treat the contract as absolutely and finally broken by the company, and, in an action against it upon the contract, to introduce evidence of his age, health, and expectancy of life, and, if his disability was permanent, to recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, deducting, however, any sum that he might have earned already or might thereafter earn, as well as the amount of any loss that the defendant sustained by the loss of his service without its fault."

In delivering the opinion of the court, Mr. Justice Gray said: "An intention of the parties that, while the plaintiff

absolutely released the defendant from that claim, the defendant might, at its own will and pleasure, cease to perform all the obligations which were the consideration of that release, finds no support in the terms of the contract, and is too unlikely to be presumed." Of the same case the supreme court of Alabama said: "The contract ⁵⁰¹ is sufficiently definite as to time and bound the defendant to its performance so long as the plaintiff should be disabled by reason of the injuries he received, which under the averment that he was permanently injured, will be for life": *Pierce v. Tennessee etc. R. R. Co.*, 110 Ala. 533, 19 South. 22. And Mr. Justice Gray said: "As we concur in that opinion, it is unnecessary to consider how far it should be considered as binding upon us in this case." The same principles are announced in *Eastern Tennessee etc. R. R. Co. v. Staub*, 7 Lea, 397, *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802, and *East Line etc. R. R. Co. v. Scott*, 72 Tex. 70, 13 Am. St. Rep. 753, 10 S. W. 99. But in the last case, the doctrine is qualified to this extent: "When, by the terms of such compromise, the company binds itself to employ the plaintiff, and it is optional with the latter to serve, there is no mutuality of contract until the plaintiff exercises the right to fix the period for which he will serve, and, until he has done so, there is no breach for which he can maintain an action."

At the instance of the plaintiff below and over the objection of the defendant, the following instruction was given: "The court instructs the jury that if they believe from the evidence that the parties to this action compromised their difference as set forth in plaintiff's declaration, and that the writing of April 27, 1897, marked 'Exhibit No. 6,' was signed by the plaintiff Rhoades after being prepared and written by defendant's agent, and that said writing embodied the actual terms of such compromise and was accepted and acted upon by defendant, then the defendant is bound by the provisions of said compromise." To the giving of said instruction the defendant excepted.

At the request of the defendant, the following instructions were given:

"1. If the jury find from the evidence that the writing of May 1, 1897, marked 'Exhibit G. W. R.' purporting to be signed by George W. Rhoades, was in fact signed by him and the stipulations and conditions therein contained were differ-

ent from the propositions made in writing by him on April 27, 1897, 'Exhibit No. 6,' the jury should take the writing of May 1, 1897, as embodying the terms upon which the parties finally agreed to compromise; and if the jury further believe from the evidence that the defendant had given the plaintiff work, as it had agreed to do, and the plaintiff failed to work to the satisfaction of his foreman or superintendent as provided in said agreement, then ⁵⁰² the defendant had the right to discharge the plaintiff, and it would not be liable for any damages in this suit.

"2. The court instructs the jury that if they find from the evidence that at the time the plaintiff entered into the employment of the defendant after his injury he made no fixed or specified time or period which he agreed to work for the defendant, then he had the right to cease working for the defendant at any time, and the defendant had the right to cease employing him at any time.

"3. The court instructs the jury that if they find from the evidence that the defendant gave to the plaintiff such work as he could do and had done, and the plaintiff refused to do such work so given him, then the defendant had the right to discharge him from its service, and you should find for the defendant."

It is contended that it was error to give plaintiff's instruction: 1. Because by the paper dated May 1, 1897, the writing of April 27, 1897, was discharged and no longer formed the contract between the parties, the two papers being different and inconsistent and the former under seal; 2. Because it ignored the transaction of May 1st, and thus violates the rule requiring instructions to cover all essential elements of the case, to the end that the jury may not be misled; and 3. Because it is inconsistent with defendant's instruction No. 1, based upon the writing of May 1st.

If two agreements of different dates, made between the same parties and covering the same subject matter, are inconsistent, the one earlier in date is impliedly discharged by the other: Clark on Contracts, 611. In *Renard v. Sampson*, 12 N. Y. 561, the rule is stated as follows: "A written contract executed between parties, not in performance of a distinct and separate provision of prior negotiations and agreements between them, but covering in its terms or legal effect the whole subject matter thereof, extinguishes and supersedes all such prior negotiations and agreements." In *Paul v. Me-*

servey, 58 Me. 419, the law is stated thus: "One contract is rescinded by another between the same parties, when the latter is inconsistent with, and renders impossible the performance of, the former." It is claimed that these two contracts or writings are different, because the first states that Rhoades "is to be given a job as watchman or other service" which he can do and there is to be no discharge without "cause," while in the second he is to be given ⁵⁰³ "an opportunity to work" so long as he gives "satisfaction." The two writings are different in terms as to the matter of employment, but are they different in legal effect? Will not the allegations of the declaration, except as to the date of the instrument mentioned in it, apply to either of the two writings? If so, may not the latter be considered a ratification or confirmation of the former, and being a receipt for the cash payment, may it not be treated as made in performance of the first rather than a new contract to take the place of it? In each case, for a valuable consideration, the defendant is bound to give the plaintiff employment, for the latter only releases his claim in consideration of the sum of six hundred dollars and "in addition" thereto the option to work for the company. The first says he shall not be discharged without cause and shall have a steady job so long as he gives satisfaction to the foreman or superintendent under whom he works. The second is silent as to cause for discharge, but repeats the language "so long as I give satisfaction to the foreman or superintendent under whom I work." If, by the second agreement, the company is bound to give plaintiff an opportunity to work, he could not be discharged without cause, although it is not so expressly stated in the contract. In no valid contract of employment can the master discharge the servant without cause, before the expiration of the period of service contracted for. This is too elementary to require any citation of authority. As both agreements bind the company to give the plaintiff employment, and declare that promise to be part of the consideration for the release, the omission of the words "will be removed only for cause" from the second is wholly unimportant, insignificant, and immaterial, and does not make it legally different from the other. By the terms of the first writing, the plaintiff was to have "a job as watchman or in other service which I can perform." The second is silent as to the kind of work contemplated. Does this make them different in effect? In the construction of a contract the

court must bear in mind the situation of the parties, the subject matter of the contract and the intention and purposes of the parties in making it, and should carry that intention into effect so far as the rules of language and the rules of law will permit: 2 Parsons on Contracts, 7th ed., 631. All parts of the contract will be so construed as to give force and validity to all of them, and to all the language used, where that is possible: 2 Parsons on Contracts, 7th ed., 636. Comparatively unimportant parts or provisions, ⁵⁰⁴ which may be severed from the contract without impairing its effect or changing its character, will be suppressed or subordinated, if, in that way, and only in that way, the contract can be sustained and enforced: 2 Parsons on Contracts, 7th ed., 637. To so construe this second paper as to make it the duty of the plaintiff to do any and all kinds of railroad work would put upon it a construction at variance with the law and so utterly ridiculous and absurd that it cannot be supposed for a moment that such was the intention of either of the parties. In every case of a contract of employment where the parties know each other and the purposes of each other at the time of entering into it, as they did here, and the terms of the contract are not to the contrary, the servant only engages to perform such service as he "can perform." If a person engage to do service which he cannot perform, his incompetence is cause for discharge. If a person make a binding contract to give employment which he fails to furnish for any reason not attributable to the fault of the employé or an act of God, such failure is a breach of the contract and an action lies. In this second writing, the kind of service not being mentioned, while in the first it is, it cannot be said that there is any contradiction between the writings as to the kind of service. But, if the second contract stood alone, this man was known, at the time of his employment, not to be qualified for the duties of a brakeman, fireman, engineer, conductor, or other position requiring special knowledge, training, experience, and skill. It was well understood between the parties that the company had other positions, the duties of which the plaintiff could perform, although he had but one leg. It could not have been in the contemplation of either of the parties that he would be required to do any work that such a man could not perform. No provision of the contract requires such a construction, and to so construe it would wholly destroy its value to the plaintiff and defeat

the intentions of the parties. It is not reconcilable with their situation, the subject matter of the contract, or their purpose, object and intention, apparent upon the face of the contract itself, as well as from the conditions under which the contract was entered into. So, in legal effect, the two papers are alike. There was but one contract to which both relate, neither nor both of which contains it all, for the actual employment took place after the execution of both, and resort may be had to both for its terms as far as they go. Freed from all erroneous conceptions of the case, the instruction ⁵⁰⁵ given for the plaintiff tells the jury substantially that the defendant is bound by that contract, and the first instruction given for the defendant, that the plaintiff was also bound by it, and if he had failed to work to the satisfaction of his foreman or superintendent, as provided in the agreement, the defendant had the right to discharge him.

But, upon the defendant's theory that the two papers are separate and distinct and inconsistent, and the first, therefore, discharged by the execution of the second, the other two criticisms upon the instruction given for the plaintiff must be disregarded, for the reason that the execution of the writing of May 1st was in issue and to be determined by the jury. This writing was not mentioned in any of the pleadings of the case, but came into the case as evidence under the plea of nonassumpsit. The plaintiff denied on oath that he had signed it. Two witnesses testified that he did sign it in their presence. This made it necessary for the jury to say which of the two writings constituted the contract between the parties. Section 40, chapter 125 of the code, reading: "Where any declaration or other pleading alleges that any person made, indorsed, assigned, or accepted any writing, no proof of the handwriting of such person shall be required, unless the fact be denied by an affidavit with the plea which puts it in issue," does not apply to writings so brought into the case. At common law, the adverse party had the right to require precise proof of all signatures and documents, making part of the claim of the party producing them, but this has been greatly modified—in some states, by rules of court, and in others by statute: 2 Greenleaf on Evidence, sec. 16. In Virginia, an act was passed February 5, 1828, dispensing with proof of the handwriting, "if the declaration alleges that they were signed by any person," unless an affidavit be filed disputing its genuineness. In 1850, after

this statute was construed by the court in the case of Kelley v. Paul, 3 Gratt. 191, the legislature passed the act as now found in said section 40, applying the rule to any writing, alleged in any pleading to have been made, etc. The instruction for plaintiff is not open, and the other objection that it ignores the transaction of May 1, 1897, upon the principles announced in the cases of McCreery v. Ohio River R. R. Co., 43 W. Va. 110, 27 S. E. 327, and Price v. Chesapeake etc. Ry. Co., 46 W. Va. 538, 33 S. E. 255, because an instruction for the defendant was given, covering said transaction as a part of its theory of the case.

⁵⁰⁶ So, upon the plan of the defense, the case presented and the evidence related to two theories, one upon the hypothesis that the contract was embodied in the writing of April 27th, and the other upon the hypothesis that the writing of May 1st formed the contract. In such case, inconsistency in the instructions, if, indeed, there be any because of the conflict, is no objection and does not violate the rule referred to in the brief. Each of them is general, covering the whole case upon one of its theories. Each party is entitled to an instruction upon his theory of the case, if there is any evidence to sustain it. The conflict thus presented is of the issue itself, the very bone of contention in the case, and is not an inconsistency in the instructions. The instructions thus presenting the contradictory theories and declaring the law upon each of them, it is for the jury to determine what the facts are, and thus apply the law as announced in one of the instructions and reject that contained in the one conflicting with it as inapplicable to the case, in arriving at a verdict. The language of defendant's first instruction shows that the application to the case of the principles of law embodied in it was dependent upon the finding of the jury as to whether Rhoades signed the writing of May 1st, for it says: "If the jury find from the evidence that the writing of May 1, 1897, marked, etc., was in fact signed by" Rhoades, etc., "the jury should take the writing of May 1, 1897, as embodying the terms," etc. So the conclusion is that the assignment of error, predicated upon the giving of said instruction, is not well taken.

The last assignment of error is grounded upon the refusal of the court to set aside the verdict and allow a new trial, it being insisted under this head that the work the plaintiff refused to do was such work as he could have done, and not

so laborious as some of the work he had already done; that, as, under the contract, the defendant might discharge the plaintiff when he ceased to "give satisfaction to the foreman or superintendent under whom" he worked, and he had complained all the time of the work assigned him, he was rightfully discharged under that clause of the contract; that it is uncontradicted that the plaintiff refused to do work assigned him; and that, if the recovery might be for the probable life of the plaintiff, there was no evidence of his habits and expectation of life, and therefore, no evidence upon which the damages allowed could have been assessed.

The refusal to do the work assigned at the time of the discharge ⁵⁰⁷ is admitted, but the plaintiff claims it was of such character that he was not bound to do it. It may not have been harder than some other work he had done, but that is not the test. The issue was whether it was beyond his ability to perform without undue exertion. Upon this question the jury had before them the nature of the work, the crippled condition of the plaintiff, all the facts and circumstances of his discharge, and the law of the case, dependent upon the facts, and it was their province to say what the facts were, and thus determine whether there was cause for the discharge. The evidence is conflicting as to what was required of him when he refused to perform it. On this point Clifford and Spencer are not in accord, and both of them differ from Rhoades. Then as to what work the plaintiff was able to do was a matter for the jury, and he was before them and they saw his condition, as well as the demeanor of himself and the other witnesses. In addition to this it must be remembered that the burden was upon the defendant to show that the discharge was for good cause: 14 Am. & Eng. Ency. of Law, 797. His complaining from time to time about the kind of work assigned him is unimportant, if even relevant, for the reason that the work he did do was satisfactory to the foreman and supervisor of track.

The principles governing the assessment of damages and the measure of damages in cases of this kind have been given: Tennessee etc. R. R. Co. v. Pierce, *supra*. They are very similar to those applying in cases of damages for injuries to the person, in which the amount is dependent upon loss of capacity for labor. In these cases, the standard mortuary tables are sometimes admitted as evidence on the question of the expectation of life: 5 Am. & Eng. Ency. of Law, 41, 42, note. But

it is not always done, nor has it been held necessary. Here the age and physical condition of the plaintiff were proved, and no reason is perceived why plaintiff's expectation of life should not have been left to the jury in this case, as is so often done in others, involving the same question, without more evidence bearing upon it than was before the jury.

There being no error in the judgment, it is affirmed.

Contracts for Permanent Employment are considered in the note to *Pennsylvania Co. v. Dolan*, 51 Am. St. Rep. 301-303. Such contracts are enforceable, and not defective for want of mutuality: *Carnig v. Carr*, 167 Mass. 544, 57 Am. St. Rep. 488, 46 N. E. 117. If one agrees to release a former employer from liability for injuries while in his employ in consideration of a promise of re-employment, the execution of the release and the promise to re-employ are mutual and binding promises: *Sax v. Detroit etc. Ry. Co.*, 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314. For a contract for permanent employment entered into by a railway company with an injured brakeman and the effect of a breach thereof, see *Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802. See, also, *Louisville etc. R. R. Co. v. Offutt*, 99 Ky. 427, 59 Am. St. Rep. 467, 36 S. W. 181.

The Remedies of an Employe' Wrongfully Discharged are considered in the monographic notes to *McMullan v. Dickinson Co.*, 51 Am. St. Rep. 515-518; *De Camp v. Hewitt*, 43 Am. Dec. 205-214.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

FIRST AVENUE LAND COMPANY v. PARKER.

[111 Wis. 1, 86 N. W. 604.]

STOCK CERTIFICATES ARE VOID IN THE HANDS OF AN INNOCENT HOLDER if they were issued on the surrender of other certificates issued without any consideration in money or property, and the statutes of the state declare that stock so issued is void. The corporation cannot be estopped from denying the validity of such stock. (p. 842.)

ESTOPPEL CANNOT CREATE CAPITAL STOCK OF A CORPORATION which the law does not permit to exist, as where it is in defiance of a statute declaring that stock issued without consideration is void. (p. 843.)

CORPORATIONS.—FOR ISSUING VOID CERTIFICATES OF STOCK a corporation is liable to any purchaser thereof in good faith for the damages sustained by him. (p. 845.)

CORPORATIONS.—THE SECRETARY OF A CORPORATION AND HIS SURETIES are answerable to it for damages sustained by it for his issuing void certificates of stock, but the existence of such damages cannot be assumed unless it is affirmatively shown that such certificates were issued to purchasers who relied on the false recitals therein. (p. 846.)

Action by a corporation against the sureties on the official bond of its secretary. The breach of duty on which the plaintiffs relied for recovery was the issuing by the secretary of one hundred shares of stock to himself and a like number to Charles Wilhelm without exacting payment of the subscription therefor. The shares so issued were transferred, and the transferee surrendered the certificates, and received from the secretary new certificates in place thereof. The secretary and

Wilhelm were both alleged to be insolvent, and the plaintiffs claimed to have been damaged in the sum of two thousand dollars, which amount should have been paid for the original certificates. The defendant demurred to the complaint, and the demurrer having been sustained, the plaintiff appealed.

Quarles, Spence & Quarles, for the appellant.

Winkler, Flanders, Smith, Bottum & Vilas, for the respondent.

4 DODGE, J. The case presented by this complaint is a very simple one, and not in accord with the situation discussed in *First Ave. Land Co. v. Hildebrand*, 103 Wis. 530, 79 N. W. 753, of which we are told that this is a sequel. As now before us, it merely appears that there were issued two certificates of stock, each for five thousand dollars par value, without any consideration; that is, neither for money, nor for labor or property, actually received by the corporation, equal to the par value thereof, as required by section 1753 of the Statutes of 1898. This being so, no reason is apparent upon which to escape the further provisions of the same section that "all stocks and bonds issued contrary to the provisions of this section shall be void." Indeed, counsel for appellant concedes effective applicability of that section to the stock originally issued, but contends that certificates of stock having been issued by the corporation asserting the ownership of stock by the parties named, upon due consideration therefor, the corporation is estopped to deny, as against one innocently purchasing such stock in reliance upon the facts so certified to be true, that the persons named did own such shares of stock. As a result of this estoppel, he contends that the innocent purchasers have become entitled to the same rights as if the certificates were true—namely, to a share in the ownership of the corporation itself, and all other rights incident to the actual ownership of stock. This is the damage to the corporation claimed to have resulted from Babcock's breach of his official duty. It is, of course, obvious that, if this position is sound to its full extent, section 1753 is very much emasculated, for that doctrine ⁵ would give practical validity to stock which the statute declares shall be void. It would likewise give practical existence and validity to stock beyond the power of the corporation. Certificates issued and passed to innocent holders would give to them the right to hold stockholders' meet-

ings, of which they might constitute a majority, to control the affairs of the company, and to share with the owners of actual capital in distribution of dividends or assets. A corporation limited by its charter to one hundred thousand dollars of stock might thus have outstanding rights in individuals to represent twice that volume.

As already stated, appellant plants his contention on the doctrine of estoppel, and cites numerous authorities asserting applicability of that doctrine to corporations in issuing certificates of stock. The cases cited present several phases of the effect of the doctrine. Thus courts have refused affirmative relief by way of cancellation of outstanding certificates improperly issued but held in good faith and for value: *Machinists' Nat. Bank v. Field*, 126 Mass. 345; *Manhattan Beach Co. v. Harned*, 27 Fed. 484; *Cincinnati etc. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 47 N. E. 249; also by way of compelling payment of unpaid subscription or assessments where certificates falsely declared stock full paid: *Steady v. Little Rock etc. Ry. Co.*, 5 Dill. 348, 372, Fed. Cas. No. 13,329; *Rood v. Whorton*, 67 Fed. 434; *In re British Farmers' etc. Co. (Nicholl's Case)*, 26 Week. Rep. 334. In other cases the false certification of stock has been held to support action for damages on the ground of fraud: *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Shaw v. Port Philip etc. Gold Min. Co.*, 13 Q. B. D. 103. In one case the supreme court of Michigan held the holder of a certificate issued upon a forged transfer of valid stock entitled to the rights of a stockholder, but based its decision on a peculiarly drastic statute of that state: *Mandlebaum v. North American Min. Co.*, 4 Mich. 465.

We are not inclined to dispute the propositions that, when the officers of a corporation act within the scope of their powers, the corporation acts, nor that, subject to inherent distinctions between artificial and natural persons, a corporation may be estopped by its acts as effectively as may a natural person. But neither legal rules nor legal fictions can overcome physical facts nor laws of nature. Closing the mouth of a party to deny will not create what cannot exist. The estoppel, however complete, against one who makes two conveyances of the same piece of land, cannot transpose it into two pieces; and that impossibility must be recognized by courts in the practical application of the estoppel and adjustment of rights. Hence it is not surprising that all courts, in applying to corporations estoppel to deny the assertions of their certificates,

have stopped short of holding that thereby could be created capital stock which, under the law, could not have existence. Counsel for appellant concedes such limit in the case of attempted overissue of stock, recognizing that when all of the capital stock possible of existence under the law has been issued, no more can come into being by any process. A corporation capable of only one thousand shares of capital stock cannot, by estoppel, be transformed into one of two thousand. "Overissued stock, no matter how overissued, represents nothing, and is wholly and entirely valueless and void": Cook on Corporations, sec. 292. "Any issue of stock in excess of the amount of the capital stock as fixed by the charter is null and void. . . . His [the purchaser's] certificate is so much waste paper, and he is not a stockholder": Cook on Corporations, sec. 426. This principle that estoppel cannot create capital stock which the law does not permit to exist is conclusive, under our statute, *supra*, against appellant's contention that by the official misconduct of the secretary in issuing full-paid certificates without any payment in fact the corporation has been damaged by the creation of stockholders' rights in those who hold such certificates or reissues in place of them. No such rights have been ⁷ created, for, by section 1753 of the Statutes of 1898, such stock is "void." That statute, as this court has heretofore said, was a "declaration of a public policy": *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 660, 18 N. W. 492. It asserts the legislative will that those otherwise dealing with corporations shall be protected, rather than those dealing in stock certificates. To effectuate that legislative purpose, the law must be enforced as it is written, and the prohibited issues of stock must be held void as stock, although those procuring such unlawful issues may often be held liable to pay therefor: *Jenkins v. Bradley*, 104 Wis. 540, 80 N. W. 1025; *Shaw v. Gilbert*, 111 Wis. 165, 86 N. W. 188. Attempts by the corporation to issue stock in defiance of this statute are as completely ineffective as attempts to issue in excess of the total authorized by law or charter.

It thus appearing that the corporation has not suffered the damage pointed out and principally insisted on by appellant, it remains to be considered whether any other damage to it appears with reasonable certainty from the allegations of the complaint. There is a suggestion that in some way the corporation has lost its opportunity to collect from those who subscribed for this stock by reason of the wrongful delivery

of the certificates, followed by their transfer and issue of new certificates to others. No such loss is apparent. The liability of Babcock and Wilhelm upon their respective subscriptions was not thereby impaired, and there is no allegation that the solvency or collectibility of either of them diminished subsequently to the stock issue, if that fact were in any wise material. We can discover no damage in that connection resulting from the secretary's acts. There is, however, a possible injury to the corporation, which may result from the issue and transfer of the void certificates by the officers having general power and authority to issue certificates of capital stock, so that their acts, whether valid or invalid, must be deemed to be the acts of the corporation itself. The consensus of decision is wellnigh ⁸ uniform to the effect that, although such certificates cannot create stock or stockholding beyond that authorized by law, they do constitute declarations of fact of the most solemn and unambiguous character, reliance upon which in the community is to be expected; and that the corporation must respond in the only way it can to protect from loss those who innocently and without negligence act in reliance on the truth of such declarations. While the corporation, by reason of its legal limitations, cannot make good the false certificate of existence and ownership of stock, it can respond in money to reimburse any damages actually suffered by those who rely on the facts so certified. We find its liability so to do declared with great unanimity. Cook on Corporations, section 293, says: "Although it is settled law that overissued stock is void and valueless, and that no action lies either to compel the corporation to recognize the holder as a stockholder, or to issue in place thereof a valid certificate, yet where overissued certificates of stock, signed, or purporting to be signed, by the corporate officers having the authority to issue stock, and actually issued by such officers, are purchased by any person, or are taken in any manner in good faith and for value, such bona fide holder may sue the corporation in tort and recover damages."

Some of the more important cases supporting this view are the following: New York etc. R. R. Co. v. Schuyler, 34 N. Y. 30; Bank of Kentucky v. Schuylkill Bank, 1 Pars. Cas. 180; People's Bank v. Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112; Kisterbock's Appeal, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381; Holbrook v. New Jersey Zinc Co., 57 N. Y. 616; Cin-

cinnati etc. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249; Bridgeport Bank v. New York etc. Ry. Co., 30 Conn. 231; Fifth Ave. Bank of New York v. Forty-second St. etc. Ry. Co., 137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378, 19 L. R. A. 331, note; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. Rep. 345; Allen v. South Boston R. R. Co., 150 Mass. 200, 15 Am. St. Rep. 185, 22 N. E. 917. The result of the view above stated is that by the secretary's breach of ⁹ his official duty there may be cast upon the corporation a liability for damages. That action is founded on the fraud accomplished by the false declarations in the certificate. To the existence of such liability, however, are necessary all the elements of the usual action for deceit. Of those elements the false representation is supplied by the certificate itself, but, in addition, it is necessary that the person making demand shall have relied thereon and shall have been ignorant of the falsity of the statements and free from any want of ordinary care and diligence: Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 166, 4 Sup. Ct. Rep. 345; Farrington v. South Boston R. R. Co., 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109. The complaint, upon most liberal construction, fails to allege that either of the purchasers of the stock certificates wrongfully issued by Babcock was ignorant of their falsity or relied thereon. It therefore does not state facts sufficient to show even that any liability has been cast upon the plaintiff by reason of their issue. Such being the case, there is no occasion to consider the further question whether an action could be maintained upon breach of the bond in suit when such breach had merely resulted in creating a liability, and before plaintiff had actually been compelled to pay anything thereon. On that general subject, see Lyle v. McCormick etc. Co., 108 Wis. 81, 84 N. W. 18; Farnsworth v. Boardman, 131 Mass. 115, 122; Kip v. Brigham, 7 Johns. 168; Jackson v. Port, 17 Johns. 479. We cannot avoid the conclusion that, although the complaint sufficiently alleges official misconduct of Babcock, and, consequently, a technical breach of the bond, it fails to show that any damage has thereby been caused the company by imposing upon it either pecuniary loss or liability thereto. Hence the demurrer must be sustained.

By the Court. The order appealed from is affirmed.

FRAUDULENT AND OVERISSUED CORPORATE STOCK.**I. Validity of Certificates of Stock.**

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- h. When Holder is Estopped from Alleging Invalidity.
 1. Of Overissued Stock.
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I. Validity of Certificates of Stock.**a. Where Stock Constitutes an Overissue.**

1. General Rule.—It is a well-established principle that any issue of stock by a corporation in excess of the amount prescribed or limited by its charter is ultra vires, and the stock so issued is void, even in the hands of a bona fide purchaser for value: Granger Life etc. Ins. Co. v. Kamper, 73 Ala. 325; McCord v. Ohio etc. Ry. Co., 13 Ind. 220; Schierenberg v. Stephens, 32 Mo. App. 314; People v. Parker Vein Coal Co., 10 How. Pr. 543; Mechanics' Bank v. New York etc. Ry. Co., 4 Duer, 570; Ryder v. Bushwick Ry. Co., 134 N. Y. 83, 31 N. E. 251; Kampman v. Tarver, 87 Tex. 491, 29 S. W. 768; Scovill v. Thayer, 105 U. S. 143. Any other rule would, of course, render nugatory those provisions of corporation charters or of the general law, the object of which is to limit

the capitalization of corporations. An overissue of stock does not, however, avoid the original issue: *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894.

2. What Amounts to an Overissue.—In several instances the question has arisen as to whether or not an overissue has actually taken place. Where shares have been surrendered and new shares issued in their stead, there is, plainly, no overissue by reason of such transaction. The new issue in such case merely takes the place of the shares surrendered: *Smock v. Henderson*, 1 Wils. (Ind.) 241; *Wells v. Thompson Mfg. Co.*, 54 Mo. App. 41. So an issue of stock for certificates which have been lost is not an overissue: *Kinnan v. Forty-second St. etc. Ry. Co.*, 21 N. Y. Supp. 789, 1 Misc. Rep. 457. And so it has been held that where no more than the legal amount of stock has been actually issued, an overissue is not proved by the mere fact that the total stock subscribed, as entered in the articles of incorporation, exceeded the legal amount: *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172. A provision in the articles of incorporation, which seeks to limit the amount of stock issuable to each stockholder to a certain specified number of shares, unless responsive to some clause in the general law, is a mere voluntary proposal, of no effect as a charter provision, and an issue in excess of the amount specified will not be void as an overissue: *O'Brien v. Cummings*, 13 Mo. App. 197. And, in general, whenever a provision establishing a certain amount as the required capitalization of corporation is merely enabling and not restrictive, an issue above the amount specified will be valid: *Agricultural Branch Ry. Co. v. Winchester*, 95 Mass. 29.

b. Where Stock is Spurious but not Overissued.

1. In Hands of Purchaser with Notice.—A very frequent case is that in which shares of stock of a corporation have been fraudulently issued, but in which such shares are in no sense an overissue. They have been issued without authority from the corporation, but are within the amount which the corporation has power to issue. A party taking with knowledge of the fraud, or of the circumstances giving rise thereto, would not be entitled to the rights of a stockholder and the certificate would be void in his hands. As to him no fraud would have been committed: See *Farrington v. South Boston R. R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109; *Allen v. South Boston R. R. Co.*, 150 Miss. 200, 15 Am. St. Rep. 185, 22 N. E. 917.

2. In Hands of Bona Fide Purchaser.—Where, however, such certificate, though fraudulent in its inception, has reached the hands of a bona fide holder for value, and the number of shares represented by the certificate will not cause an overissue, the corporation will be held bound to make good such certificates to the

extent of any shares owned by the company. The distinction between this case and those in which the fraudulent certificates constitute an overissue is plain. When the capital stock of a corporation is limited by its charter to a certain number of shares, the board of directors cannot themselves, nor by an agent, increase such amount, and to permit negligence or misconduct on the part of an officer of the corporation to do what the corporation cannot itself legally do would be to place a premium on fraud. Where, however, the number of shares represented by a fraudulently issued certificate would not cause an overissue, a corporation should be bound by the fraud or misconduct of its agent: *American Wire Nail Co. v. Bayless*, 91 Ky. 94, 15 S. W. 10; *New York etc. R. R. Co. v. Schuyler*, 38 Barb. 534; *Case of Hassinger*, 2 Ashm. 287; *Fosdick v. Sturges*, 1 Biss. 255, Fed. Cas. No. 4956; *Manhattan Beach Co. v. Harned*, 27 Fed. 484. Bona fide holders of such stock are to be regarded as stockholders of the corporation and entitled to all the rights of such: *Case of Hassinger*, 2 Ashm. 287. They are, however, not compelled to retain the stock fraudulently issued, but are entitled to an election of remedies: *Fosdick v. Sturges*, Fed. Cas. No. 4956, 1 Biss. 255. From the rule that such certificates are valid in the hands of bona fide holders, it follows that the corporation cannot maintain an action to cancel them: *Machinists' Nat. Bank v. Field*, 126 Mass. 346; *Pratt v. Taunton Copper Co.*, 123 Mass. 110, 25 Am. Rep. 37; *Manhattan Beach Co. v. Harned*, 27 Fed. 484. "Stock certificates," says the court in *Appeal of Kisterbock*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381, "issued by a corporation having power to issue are a continuing affirmation of the ownership of the special amount of stock by the person designated therein, or his assignee, and the purchaser has a right to rely thereon."

c. **Where Stock is Void by Statute.**—In many states constitutional or statutory provisions, intended to prevent overcapitalization and the "watering" of stock, provide that: "No corporation shall issue stocks or bonds except for labor done, services performed, or money and property actually received; and all fictitious increase of stock or indebtedness shall be void." This is to be distinguished from the "trust fund theory" with which it is frequently confused. The latter has reference to stock which is issued as fully paid, but for which, in fact, par value has not been paid, either in money or property. In such case it is held that while, as between the corporation and the subscriber, the stock may be considered fully paid, the entire capital stock is a "trust fund in equity" for creditors, and they may collect the difference between the price paid for and the par value of the stock, notwithstanding the agreement between the corporation and the stockholder.

The provision in question, however, is purely statutory and renders stock issued in violation of it null and void: *Beitman v. Steiner Bros.*, 98 Ala. 241, 13 South. 87; *Williams v. Evans*, 87 Ala. 725, 6 South. 702; *Perry v. Tuscaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364, 9 South. 217; *Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 South. 522; *Smith v. Alabama Fruit Growing etc. Co.*, 123 Ala. 528, 25 South. 232; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Arkansas River etc. Co. v. Farmers' Loan etc. Co.*, 13 Colo. 587, 22 Pac. 954; *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 660, 18 N. W. 492; *New Castle etc. Ry. Co. v. Simpson*, 21 Fed. 533. All the cases in this connection seem to have arisen between the corporation and the party to whom such spurious stock was issued. The question as to the validity of such stock in the hands of a bona fide holder is raised but not decided in the case of *State v. Webb*, 110 Ala. 214, 20 South. 462. On principle, however, such stock would seem to be void. Its invalidity is statutory, and it is rendered void, as is said in *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492, by "a declaration of a public policy." In the face, then, of a provision in a statute founded in public policy, and expressly declaring certain stock void, the bona fides of the holder would seem to be immaterial.

The difficulty arises in this connection in determining what is "fictitious" stock within the meaning of these provisions. Except in cases where the provision itself requires payment for the stock at its par value (*Altenberg v. Grant*, 85 Fed. 345, construing the provision of the Kentucky constitution) it is uniformly held that the sale need not be at the par value of the stock: *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Railroad Co. v. Thompson*, 103 Ill. 187, 201; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015; *Brown v. Duluth etc. Ry. Co.*, 53 Fed. 889; *Continental Trust Co. v. Toledo etc. Ry. Co.*, 82 Fed. 642; *Memphis etc. R. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482. Stock disposed of for a valid consideration is not "fictitious," and if it be not a mere attempt to evade the law, but is a real transaction, it does not fall within the prohibition of the provisions referred to. Where, however, the law expressly requires payment for the stock at its par value: *Altenberg v. Grant*, 85 Fed. 345; *Union Trust Co. v. New York etc. Ry. Co.*, 17 Week. Law Bull. 176; or where the transaction was plainly a mere attempt to evade the law, the issue of stock thereunder will be void; *New Castle etc. Ry. Co. v. Simpson*, 21 Fed. 533.

As to what constitutes "money" and "property" within the meaning of these provisions, there is but little difficulty. It is well settled that stock may be issued in exchange for the construction of a railroad: *Cott v. Van Brunt*, 82 N. Y. 535; *San Antonio Ry. Co. v. Adams*, 6 Tex. Civ. App. 102, 25 S. W. 639;

Coe v. East etc. Ry. Co., 52 Fed. 531; Brown v. Duluth etc. Ry. Co., 53 Fed. 889; New Castle etc. Ry. Co. v. Simpson, 21 Fed. 533. The goodwill of a business is "property": Washburn v. National Wall Paper Co., 81 Fed. 17. A conditional note is not, however, "money received," and an issue of stock in exchange for such a note would seem to be void: Jefferson v. Hewett, 103 Cal. 624, 37 Pac. 638. But where a statute requires payment in cash, it is held that paying the balance of an account between the parties is a proper fulfillment of the statute: Larocque v. Beauchemin, [1897] App. Cas. 358.

d. Where Stock is Irregularly Issued to Complete a Transfer.—Where a corporation has transferred stock standing in the name of one person to another person without previously requiring the surrender of the old certificate, and in perfecting such transfer has issued a new certificate, this latter certificate is, of course, spurious as between the corporation and a party having knowledge of the facts. And the same rule obtains, where, for any reason, the party taking the new certificate is charged with knowledge: Farrington v. South Boston R. R. Co., 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. Rep. 345. A party, however, who takes such certificate in good faith is not bound to see that the vendor has duly surrendered the old certificate: Allen v. South Boston R. R. Co., 150 Mass. 200, 15 Am. St. Rep. 185, 22 N. E. 917. The case cited was one in which the certificate, if held valid, would have constituted an overissue, and an action of damages was therefore the only remedy possible, since court cannot declare an overissue valid and binding: People v. Parker's Vein Coal Co., 10 How. Pr. 543. It would seem, however (though there is apparently no case directly in point), that if the authorized capital of the corporation would not thereby be exceeded, such certificate should be held valid and its holder entitled to the rights of a stockholder: See Hall v. Rose Hill etc. Road Co., 70 Ill. 673; New York etc. Ry. Co. v. Schuyler, 34 N. Y. 30; Bridgeport Bank v. New York etc. Ry. Co., 30 Conn. 231; Baker v. Wasson, 59 Tex. 140.

II. Remedies of Parties.

a. Action by Purchaser Against Corporation for Damages.

1. General Rule.—The determination of the validity of a certificate is, however, by no means decisive of the rights of the parties thereto. In many cases the invalidity of the certificate gives rise to rights of action on the part of both the holder and the corporation. Thus where shares which the corporation had no right to issue (as where the authorized capital has been exhausted) are fraudulently issued by those officers of the corporation whose duty it is to issue shares, the certificates are null and void in the hands of even a bona fide holder. Yet such overissue is uniformly held to

give a right of action against the corporation, and a holder of the certificate who has taken it for value and without knowledge of any fact tending to show its invalidity, is entitled to reimbursement for any loss he may have incurred in reliance upon the validity of the certificate: *Tome v. Parkersburg Branch Ry. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Allen v. South Boston R. R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185, 22 N. E. 917; *Titus v. Great Western Turnpike Co.*, 61 N. Y. 237; *New York etc. R. R. Co. v. Schuyler*, 1 Abb. Pr. 417; *Archer v. Dunham*, 89 Hun, 387, 35 N. Y. Supp. 387; *New York etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Willis v. Fry*, 13 Phila. 33; *Jarvis v. Manhattan Beach Co.*, 53 Hun, 362, 6 N. Y. Supp. 703; *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112; *In re Bahia etc. Ry. Co.*, L. R. 3 Q. B. 595. This principle is no more than the application of the well-established rule of agency that the principle "is liable to third persons in a civil suit, for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies *respondeat superior*."

And in accordance with this principle it is likewise held that, in those cases where the certificate would not, if valid, constitute an overissue of corporate stock, any person, who in good faith has advanced money, in reliance upon the validity of a stock certificate fraudulently issued by the officers of the corporation, may sue the corporation for the loss so incurred: *Bridgeport Bank v. New York etc. Ry. Co.*, 30 Conn. 231; *Richardson v. Delaware Loan Assn.*, 9 Houst. 354, 32 Atl. 980; *Western Md. Ry. Co. v. Franklin Bank of Baltimore*, 60 Md. 36; *Mandlebaum v. North American etc. Co.*, 4 Mich. 465; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Fifth Ave. Bank v. Forty-second St. etc. Ry. Co.*, 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712; *Mutual Life Ins. Co. v. Forty-second etc. Ry. Co.*, 74 Hun, 505, 26 N. Y. Supp. 545; *New York etc. Ry. Co. v. Schuyler*, 34 N. Y. 30; *Cincinnati etc. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 47 N. E. 249; *Appeal of Klisterbock*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381; *Willis v. Fry*, 13 Phila. 33; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Cas. 180; *Baker v. Wasson*, 59 Tex. 140; *Manhattan Beach v. Harned*, 27 Fed. 484; *Show v. Port Philip etc. Min. Co.*, L. R. 13 Q. B. D. 103. This is especially the case where, upon inquiry at the office of the corporation, the party was assured that the certificate was genuine, although in fact it was not: *Jarvis v. Manhattan Beach Co.*, 53 Hun, 362, 6 N. Y. Supp. 703.

2. *Who Deemed Purchaser in Good Faith.*—Where, however, a purchaser takes a certificate with knowledge of facts which should put him upon inquiry, he will not be regarded as an innocent

purchaser: *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894. Upon the question of what facts the knowledge of which is sufficient to put a party upon the path of inquiry and take from him the character of an innocent purchaser the authorities are divided. There seems, however, to be a well-defined class of cases in which the weight of authority denies the position of bona fide purchaser to one who deals with the officer of a corporation in his individual capacity, loaning money to him for his private use upon a certificate issued in the name of the purchaser: *Farrington v. South Boston R. R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. Rep. 345, affirming 15 Fed. 141. And where a president of a corporation fraudulently induces a stockholder to surrender certain stock, giving his individual bill therefor, such transaction is purely personal between the president and the stockholder, and the latter cannot recover from the corporation for any fraudulent issue of stock in connection therewith: *Appeal of Wright*, 99 Pa. St. 425. But where, as in *Titus v. G. W. Turnpike Road*, 61 N. Y. 237, the stock is issued, not to the purchaser, but by the officer to himself, this is not such a fact as to put a purchaser upon inquiry. This distinction seems not to have been recognized in *Willis v. Fry*, 13 Phila. 33, although insisted upon in *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. Rep. 345, as the distinguishing point in *Titus v. Turnpike Road*, 61 N. Y. 237. See *Cincinnati etc. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 47 N. E. 249; *Manhattan Life Ins. Co. v. Forty-second St. etc. Ry. Co.*, 139 N. Y. 146, 34 N. E. 776; *Knox v. Eden Musee etc. Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988, reversing 74 Hun, 483, 25 N. Y. Supp. 164, and 26 N. Y. Supp. 482.

Where, however, the officer issuing the spurious certificate had no authority, real or apparent, to issue the certificate: *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172, 26 Am. St. Rep. 230, 28 N. E. 142; or where such power was limited to cases where he was specially authorized by the board of directors, the corporation is in such case not liable, if the officer issues a certificate without such authorization: *Holbrook v. Fauquier etc. Tp. Co.*, 3 Cranch C. C. 425. Fed. Cas. No. 6591; *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 512, 17 N. E. 408.

In order to warrant a recovery from the corporation because of losses arising from a reliance upon the validity of the certificate, the holder must, moreover, have expended money or otherwise incurred a loss, because of the issuance of the spurious stock. Merely receiving such stock as security for a pre-existing indebtedness is not, therefore, sufficient to entitle him to recover. The claim is not on the stock, but a claim to indemnity for injuries suffered by reason of the fraudulent act: *Appeal of Kisterbock*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

b. Action for Money Paid Upon Subscription to Void Stock. Upon the question of whether or not a subscriber to stock (made illegal by statute), who has paid part of the purchase price, can recover this if the contract be not executed, the authorities are in conflict. In *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492, it was held that no such recovery could be had, the court saying: "This court, as well as nearly all other courts, has held that public policy and purity in the administration of justice forbid a court from entertaining an action when the plaintiff's claim arises out of a contract made in violation of a statute, or which is against public policy or morality, and when a party has delivered his property upon such contract to another, or paid his money on it, he cannot maintain an action to recover it back." And such was also the holding in *Knowlton v. Congress etc. Spring Co.*, 57 N. Y. 518. In the latter case, however, a new trial was ordered, and on the new trial the cause was removed to the circuit court of the United States, where an exactly opposite conclusion was reached and the plaintiff was held entitled to recover: *Knowlton v. Congress etc. Co.*, 14 Blatchf. 364, Fed. Cas. No. 7903, which decision was affirmed in 103 U. S. 49, by the supreme court of the United States. In the latter case it was held that, "conceding the contract to be illegal, money paid by one of the parties in part performance can be recovered back, the other party not having performed the contract, or any part of it, and both parties having abandoned the illegal agreement before it was consummated."

c. Action by Purchaser Against Officer Guilty of the Fraudulent Issue.—The purchaser of fraudulent stock may, on well-established principles, sue the officer guilty of the fraudulent issue, and recovery may be had for any injury sustained by reason of having purchased the certificates in reliance on their genuineness. The only privity necessary is that created by the unlawful act and the consequential injury, and it makes no difference, therefore, whether the stock was bought in the market or from the officers guilty of the fraud: *Bruff v. Mali*, 36 N. Y. 200; *Shotwell v. Mali*, 38 Barb. 445; *Cozeaux v. Mali*, 35 Barb. 578. See, also, *Barnes v. Brown*, 80 N. Y. 527.

d. Action by Purchaser Against Vendor of Stock.—And on equally well-established principles, the vendee of fraudulent or illegal stock may maintain an action against his vendor, if the latter was a party to the fraudulent issue. In such a case he may rescind and recover back the amount paid: *Fosdick v. Sturges*, 1 Bliss. 255, Fed. Cas. No. 4956. But where the vendor has no knowledge of the fact that the stock sold is part of an overissue, there is no implied warranty further than that "the certificates were in the usual form, and regular on their face and were issued by the duly constituted officers of the company, and were sealed with the genuine seal of the company." The vendor does not impliedly

warrant that the stock is not part of a fraudulent overissue by the officers of the company: *People's Bank v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112.

e. Action by Corporation Against Officer Guilty of the Fraudulent Issue.—It is an elementary rule of agency that the principal may recover from his agent for any damage to which the unauthorized act of the latter has subjected him. In accordance with this, it is held that when an officer of a corporation has fraudulently issued and sold spurious stock, which by being intermingled with valid stock has become indistinguishable from it, the corporation may recover the money received by such officer. Such recovery may be had in an action in tort, or (by waiving the tort) in assumpsit: *Rutland Ry. Co. v. Haven*, 62 Vt. 39, 19 Atl. 769.

f. Action by Corporation or Legal Stockholders to Cancel Spurious Stock.—The more frequent actions, however, by a corporation with relation to spurious stock issued by its officers are those proceedings in which it is sought to cancel such shares with the aid of a court of equity. Whenever certificates of stock have been fraudulently issued and have not reached the hands of those entitled to treat them as valid (as where the shares are overissued, or where, though not an overissue, are in the hands of those who took with knowledge) the corporation may maintain a suit in equity to cancel such certificates as a cloud upon title: *New York etc. Ry. Co. v. Schuyler*, 17 N. Y. 592, also 7 Abb. Pr. 41; *Cincinnati etc. Ry. Co. v. Citizens' Nat. Bank*, 22 Week. Law Bull. 248. And in such action all holders of spurious certificates may be united without rendering the bill multifarious: *New York etc. Ry. Co. v. Schuyler*, 17 N. Y. 592.

The rights of all holders of legal shares are manifestly prejudiced by outstanding spurious certificates, and they may therefore maintain an action to cancel such instruments as clouds upon title: *Campbell v. Morgan*, 4 Ill. App. 100; *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048; *Kimball v. New England etc. Ry. Co.*, 69 N. H. 485, 45 Atl. 253. In such case, however, the corporation must be joined as a party to the suit: *Campbell v. Morgan*, 4 Ill. App. 100. An overissue of stock does not, of course, have the effect of invalidating the previous or original issue, and no suit for cancellation of the latter can be maintained: *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894. Stockholders may likewise bring suit to prevent an unauthorized issue of stock: *Ernst v. Elmira Municipal Imp. Co.*, 54 N. Y. Supp. 116, 24 Misc. Rep. 583; or to enjoin the transfer of illegally issued stock certificates and to apply the receipt of their sale in protecting the corporation from the claims of innocent purchasers: *Fisk v. Chicago etc. R. R. Co.*, 53 Barb. 513. Where, however, a statute prohibits the sale of shares of corporate stock except for "money paid, labor done, etc.,"

this provision is held to be intended as a protection to the private rights of the shareholders, and gives the state no power to protect them by a suit in its own name: *Minnesota v. Guaranty etc. Safe Deposit Co.*, 73 Fed. 914.

g. When Corporation is Precluded from Alleging Invalidity of Spurious Stock.

1. **By Estoppel.**—The cases relating to the rights of various parties concerned in actions upon overissued or spurious corporate stock are filled with references to estoppel, negligence, ratification, etc. In by far the larger number of cases these principles have no legitimate application and merely tend to confuse the subject. There are, of course, cases in which they have a valid operation, and in cases in which it is sought to ascertain the validity of the certificate itself, estoppel or ratification may well be called into play. So in cases where, although the suit is for damages only, no agency, real or apparent, in the officer who issued the spurious certificate can be fastened upon the corporation. The negligence of the corporation may still operate to render it liable. In most of the cases, however, the question is simply one of agency, to be determined by the rules governing the liability of a principal for the frauds of his agent, and without any reference to estoppel, ratification, or negligence.

The frequency with which these principles have been appealed to in decided cases have given rise, nevertheless, to certain fixed rules as to when they may and when they may not operate. Thus, where fraudulently issued stock has been transferred by the corporation and new stock issued therefor, the corporation will be estopped to deny the validity of the certificate so issued: *Hall v. Rose Hill etc. Road Co.*, 70 Ill. 73; *Mandlebaum v. North American etc. Co.*, 4 Mich. 465; especially where, in reliance thereon, the party to whom the new certificate is issued has been induced to omit taking steps to secure restitution from the person committing the fraud: *Manhattan Beach Co. v. Harned*, 27 Fed. 484. And where, upon inquiry at the office of the corporation, a pledgee is assured of the validity of a fraudulently issued certificate, the corporation is held estopped from denying their liability, where money is advanced by the pledgee upon the faith of such representation: *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 51 Am. St. Rep. 727, 43 N. E. 68, affirming 75 Hun, 100, 26 N. Y. Supp. 1061. And in *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616, the doctrine of estoppel is held to apply generally to all cases where one in good faith has advanced money upon the faith of the representations in a certificate of stock. This, however, was a case in which the certificates were regularly issued by the corporation, and estoppel was here properly invoked and applied. In the frequently criticised case of *Mechanics' Bank v. New York etc. R. R. Co.*, 13 N.

Y. 638, it was held that estoppel could not be invoked to aid a stranger to the original contract, and that a certificate of stock is not a representation of the existence of certain facts to the public in general. This is, however, very doubtful, and the ground given in *New York R. R. Co. v. Schuyler*, 38 Barb. 534, to the effect that a corporation cannot be estopped from questioning the validity of an overissue of stock, is preferable. And in *Brooklyn etc. R. R. Co. v. Strong*, 75 N. Y. 591, where a corporation sued its officer for an unauthorized issue of stock, it was held that the corporation was not precluded from seeking recovery from the defendant, merely because no action had been taken by it for some time, relative to the unauthorized issue, and in the meantime the stock had passed into the hands of a bona fide purchaser. But receipt of payments on shares of a building association estops such association from afterward questioning the validity of the stock: *North American Bldg. Assn. v. Sutton*, 35 Pa. St. 463, 78 Am. Dec. 349.

2. **By Ratification.**—Not at all infrequently the doctrine of ratification is called in to validate an issue of stock originally unauthorized. The general principles governing the determination of the question whether or not certain facts amount to a ratification are, of course, here equally applicable. Exactly what acts do amount to a ratification is necessarily a question dependent upon the exact circumstances of each case. Merely keeping silent as to a fraudulent overissue for two months, and while the books of the officers issuing the fraudulent stock were being expeted, has been held insufficient to charge a corporation with the ratification of the fraudulent issue: *Cincinnati etc. Ry. Co. v. Citizens' Nat. Bank*, 24 Week. Law Bull. 198. But in the same case it was held that the act of the president of the corporation, inducing others to purchase or otherwise deal with such stock, assuring them that it was ample security, amounted to a ratification of the issue as to the parties so misled. Likewise, it is uniformly held that where all parties concerned have, for a considerable length of time, had knowledge of the facts affecting the validity of the stock and have acquiesced, this will amount to a ratification: *St. Croix Lumber Co. v. Mittlestadt*, 43 Minn. 91, 44 N. W. 1079; *Reed v. Hayt*, 109 N. Y. 659, 17 N. E. 418. And, in general, wherever a corporation has by any positive action so treated the stock that it has thereby held it out to the world as valid, as by accepting it as collateral, such action will be deemed a ratification: *American Wire Nail Co. v. Bayless*, 91 Ky. 94, 15 S. W. 10.

3. **By Negligence.**—In many cases a corporation has been held liable for damage caused by reliance upon the validity of a fraudulent issue of stock, upon the ground that the negligence of the corporation has caused the injury. This negligence may consist in the

negligent selection or retention of an incompetent or dishonest agent, or it may be no more than a negligent supervision of the conduct of an agent. In *Hill v. C. F. Jewett Pub. Co.*, 154 Mass. 172, 26 Am. St. Rep. 230, 28 N. E. 142, it was sought to hold the defendant corporation liable on the ground that the issue of spurious stock by which the plaintiff had been damaged was rendered possible by negligence on the part of the corporation in selecting as its president a person known to the corporation to have been guilty of previous misconduct in transferring shares of stock. The court recognized the validity of the legal principle contended for, but held that there was no showing of negligence in the corporation, since there was "nothing to show that the corporation or its other members had reason to suppose from what Jewett had done that he would be likely to issue forged certificates of shares, if allowed access to the certificate-book and seal of the corporation; and accordingly it is not to be held responsible for his criminal fraud, as for an act made possible by its negligence."

The more frequent cases in which it is sought to charge the corporation on the ground of negligence are those in which its negligent conduct consists, not in the selection, but in the supervision, of its agents. That the corporation does owe a duty of supervising the acts of its agents is conclusively shown by *Smith, J., in Citizens' Nat. Bank v. Cincinnati etc. Ry. Co.*, 29 Week. Law Bull. 15, 34, quoting the following from *New York etc. R. Co. v. Schuyler*, 34 N. Y. 30: "If the directors of a company, no matter whether through inattention or otherwise, suffer its subordinate officers to pursue a particular line of conduct for a considerable period without objection, they are as much bound to those who are not aware of any want of authority as if the power had been directly conferred. I cannot file my mind to the belief that equity attaches no consequence to such negligence upon the idea that it is not sufficiently proximate as a cause of the injury. . . . A wrong which ordinary care would prevent is in a legal sense caused by the omission of that care where it is a duty to use it." And in *Cincinnati etc. Ry. Co. v. Citizens' Bank*, 56 Ohio St. 351, 47 N. E. 249: "From the character of the certificate it (i. e., the corporation) must be held to contemplate and know that persons relying upon it will purchase the certificate in the market and meet with loss, should the person named in it not be the lawful owner of it. It must therefore be held to care in regard to this, and answer for any loss, the result of its negligence or of its agents."

Accordingly, in the cases above cited it was held that the corporation was liable for the injuries caused by the negligence of its directors, which permitted the perpetration of the fraud resulting in injury to the plaintiff: See, also, *Allen v. South Boston R. R. Co.*, 150 Mass. 200, 15 Am. St. Rep. 185, 22 N. E. 917. In

Knox v. Eden Musee Co., 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988, reversing 25 N. Y. Supp. 164, and 26 N. Y. Supp. 482, 74 Hun, 483, it was held that, where the president ordered an employé to cancel certain shares which were left in a safe to which the manager had access, and which the latter fraudulently put in circulation, the facts were not sufficient to charge the company with negligence, even though such act of the president was an infraction of a by-law of the company. "By-laws," the court said, "are primarily for the protection of the corporation enacting them and its stockholders," and a violation of them is not necessarily a violation of a duty owing to the public generally. The facts otherwise not constituting, in the court's opinion, actionable negligence, the corporation was therefore held not liable.

h. When Holder is Estopped from Alleging Invalidity.

1. Of Overissued Stock.—In many cases in which the issue of spurious stock by a corporation or its officers would otherwise give to the purchaser a right of action for the injury incurred in reliance upon the validity of such stock, the doctrines of laches, estoppel, negligence, or ratification are called in to defeat the claims of the stockholder. But, as we have seen, an overissue, being entirely beyond the powers of the corporation, cannot be validated by any estoppel operating against the corporation. The same rule necessarily obtains with reference to a stockholder. When, therefore, the stock is spurious because it constitutes an overissue, it is stock which cannot legally exist, and the person taking it cannot, by estoppel or otherwise, become a stockholder: **American Tube Works v. Boston Machine Co.**, 139 Mass. 5, 29 N. E. 63; **Ross-Meehan Shoe Foundry Co. v. Southern Malleable Iron Co.**, 72 Fed. 957.

2. Of Spurious Stock not Constituting an Overissue.—Where, however, the spurious stock was not an overissue, but was entirely within the powers of the corporation, its invalidity being caused merely by some irregularity in its issue, a stockholder may, by his acts, have precluded himself from questioning the validity of the stock. Thus it is uniformly held that the validity of an issue of stock cannot be attacked where, although not made with the formalities of law, it was assented to by all the stockholders: **Bailey v. Champlain etc. Co.**, 77 Wis. 453, 46 N. W. 539; **Poole v. West Point Butter etc. Co.**, 30 Fed. 513; **Stutz v. Handley**, 41 Fed. 531. Nor can one who, as stockholder, assented to the issue of stock afterward urge its invalidity: **Southern Plank Road Co. v. Hixon**, 5 Ind. 165; **Jones v. Concord etc. R. R. Co.**, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614; **Knowlton v. Congress etc. Spring Co.**, 57 N. Y. 518. So a purchaser of stock will not be permitted to set up the irregularity of its issue: **Southern Life Ins. etc. Co. v. Lanier**, 5 Fla. 110, 58 Am. Dec. 448; **Canal Bank v. Holland**, 5 La.

Ann. 363; Upton v. Jackson, Fed. Cas. No. 16,802, 1 FlRp. 413; Banigan v. Bard, 134 U. S. 291, 10 Sup. Ct. Rep. 565; Bard v. Banigan, 39 Fed. 13; Washburn v. National Wall Paper Co., 81 Fed. 17. Non-assenting stockholders must dissent within a reasonable time and must take steps to make their dissent effective. Failure to do so, for any considerable length of time, especially when coupled with any recognition of the stock, such as voting it at meetings or the receipt of dividends thereon, will be construed to amount to an acquiescence in, and in some cases to a ratification of, the irregular issue: Barrows v. Natchaug Silk Co., 72 Conn. 658, 45 Atl. 951; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; Drake v. New York Suburban Water Co., 50 N. Y. Supp. 826, 26 App. Div. 499; Taylor v. South etc. R. Co., 13 Fed. 152. And even where there has been no dealing with the stock which could amount to a recognition of its validity, the right of a holder to question the regularity of an issue may be barred by laches alone. Failure to object for thirty years was held to have this effect in Foster v. Belcher's Sugar Refining Co., 118 Mo. 238, 24 S. W. 63. A period of twenty years was held sufficient to bar the right to object in Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362. So as to failure to object for six years: Jutte v. Hutchinson, 189 Pa. St. 218, 42 Atl. 123. And in a somewhat similar case failure to complain for a period of five months was held to amount to laches: Dunn v. State Bank, 59 Minn. 221, 61 N. W. 27.

LANGNECKER v. TRUSTEES OF THE GRAND LODGE, ANCIENT ORDER UNITED WORKMEN.

[111 Wis. 279, 87 N. W. 293.]

AN APPEAL FROM A VOID PROCEEDING IS NOT NECESSARY. Hence a member of a beneficial association need not appeal from an order expelling him, if it is void. (p. 861.)

BENEFICIAL ASSOCIATIONS.—FAILURE TO PAY ASSESSMENTS AFTER VOID EXPULSION from a beneficial association does not defeat the member's right to benefits if he has been notified that the lodge will not receive any more from him, because it no longer regards him as a member. (p. 861.)

FORFEITURE NOT ENFORCEABLE BY PARTY IN FAULT.—One party cannot predicate a forfeiture upon an omission by the other which the conduct of the first brought about. (pp. 861, 862.)

BENEFICIAL ASSOCIATIONS—BY-LAWS, WHEN RETROSPECTIVE.—A by-law of a beneficial association declaring that any member of the order who, after a date specified, enters into the business of selling intoxicating liquors by retail shall be expelled, applies to members who had become such before the enact-

ment of the by-law, though they were engaged in such business when they were admitted to the order, if they had discontinued it before the adoption of the by-law. (p. 863.)

BENEFICIAL ASSOCIATIONS—FORFEITURE OF INSURANCE BY BEING GUILTY OF CAUSE FOR EXPULSION.—If a certificate of insurance issued by an order to one of its members provides that no liability shall accrue unless the member shall, in every particular, while a member, comply with all the by-laws of the order, and he is afterward guilty of an offense against the by-laws, for which he might have been expelled, his right to insurance is forfeited, though no proceeding was taken for his expulsion. (p. 867.)

BENEFICIAL ASSOCIATIONS.—ACTS MUST BE DEEMED PROHIBITED by the by-laws of a beneficial association if they declare that a member guilty of them shall be expelled. (p. 869.)

Action on a benefit certificate issued to Emil Richter in October, 1881. At that time he was a saloon-keeper. He discontinued that business in 1885, but re-entered it in July, 1894. In June, 1893, the by-law referred to in the opinion of the court was adopted. On August 11, 1894, he was declared expelled from the order, but without any notice or opportunity to be heard. After his expulsion he tendered certain assessments in September, 1894, but they were refused on the claim that he was no longer a member. Assessments were made against him up to and including January, 1895, and notice thereof given in the official paper of the order, of which a copy was mailed to him. He died while unpaid dues and assessments against him amounted to eighty-five dollars and seventy-five cents. The trial court found that Richter was a member in good standing at the time of his death, that the proceedings for his expulsion were void, and that plaintiff was entitled to recover the amount of the benefit certificate, less the amount of dues unpaid at Richter's death. The laws of the order declared that a member neglecting to pay his dues for six months should be reported to the grand lodge, whose master workman should declare the member expelled, unless the lodge directed otherwise; also that every member failing to pay assessments on or before the 28th of the month in which they were made should forfeit his rights as a member, and stand suspended from all the rights, benefits, and privileges of the order.

C. M. Masters, for the appellant.

Robert Lees and Theodore Buehler, for the respondent.

283 MARSHALL, J. It is conceded that the proceeding to expel Richter from defendant order was void, but it is said

his remedy was by appeal. No reason is perceived why the rule does not apply, as contended by respondent's counsel, that an appeal from an inferior to a superior tribunal to avoid the effect of an absolutely void proceeding is unnecessary. So far as we have been able to discover, the courts that have passed upon the question have so held: *Glardon v. Supreme Lodge K. of P.*, 50 Mo. App. 45; *Mulroy v. Supreme Lodge K. of H.*, 28 Mo. App. 463; *Hall v. Supreme Lodge K. of H.*, 24 Fed. 450. The text-writers state the law likewise: *Niblack on Benefit Societies*, 101. The principle seems so elementary that we are not required to resort to authority to support it.

But it is said by appellant that, conceding the expulsion was void, Richter ceased to be a member for failure to pay the assessments that became chargeable to his membership subsequent to those which were tendered and refused. The conclusive answer to that is that the assured, having been notified that the lodge would not receive any more money from him because he was no longer a member thereof, was not bound to offer to pay assessments subsequently made. The provision of the insurance contract rendering it void for failure to pay assessments contemplated a readiness on the part of the assurer to receive the amount of assessments when seasonably tendered; and a refusal in that regard upon grounds in their nature continuous suspended the operation of such provision till notice was brought home to the assured that the attitude of the assurer had changed. There is abundant authority to that effect, but as this court has very recently considered the subject, reference to authority elsewhere is unnecessary. In *Guetzkow v. Michigan etc. Ins. Co.*, 105 Wis. 448, 81 N. W. 652, Mr. Justice Dodge, speaking for the court, said: "The rule of law is maintained with great unanimity that one party cannot predicate a forfeiture upon an omission by ²⁸⁴ the other which his own conduct has helped to bring about; that a declaration that a policy of insurance is already forfeited will constitute a sufficient justification for the omission to tender subsequently accruing premiums or installments, upon the ground that the assured is justified in believing that no tender would be accepted, and the formality is therefore unnecessary."

It follows that Richter was a member of the Order of United Workmen at the time of his death. But appellant insists that, conceding such to be the case, respondent was not entitled to

recover, since it was not disputed that Richter entered into the business of selling intoxicating liquor as a beverage subsequent to August 1, 1893, contrary to the provision of the insurance contract prohibiting him from so doing, and that he remained in such occupation up to the time of his death; that for such violation of the laws of the order the provision of the contract of insurance, to the effect that there shall be no liability upon any certificate of membership if the member shall be guilty of having violated any law of the order or is not in good standing at the time of his death, extinguished all liability under the certificate. Respondent answers that proposition by saying that Richter was engaged in the business of selling intoxicating liquor as a beverage at the time his membership commenced; that though it was competent for the order to make outstanding certificates of membership subject to laws created by its governing body subsequent to the issuance thereof, the law invoked by appellant was not intended to affect members circumstanced as Richter was; that it was aimed at persons entering into the business of selling intoxicating liquor as a beverage who were not so engaged at the time of the passage of the law, or had not theretofore during their membership been in such business; that persons who had been in such business during their membership and prior to the passage of such law were permitted to ²⁸⁵ continue therein or go out of and subsequently re-enter it at pleasure. The language of the law is as follows: "Any member of the order who shall after August 1, 1893, enter into the business of selling by retail, of intoxicating beverages, shall be expelled from the order." That seems plain. There is no uncertainty either as to its meaning or purpose; therefore, there is no room for the application of rules of construction. Counsel would have the law read as if a particular class of members of the order were excepted from its provisions. We can see no justification for ingrafting such an exception upon a plain contract by judicial construction. The law plainly applied to all members of the order not engaged in the prohibited business at the time mentioned therein, and Richter had not been so engaged for some nine years.

It follows that Richter, at the time of his death, was a member of defendant order and in good standing, so far as any affirmative action on its part indicates to the contrary, but was nevertheless guilty of having violated one of its laws for which his expulsion from the order was expressly required

upon proper proceedings being had for that purpose. No discretion rested with the governing body of the order having jurisdiction of the matter to expel or not to expel him. Upon the subject being presented for action in the manner provided by the laws of the order there was room for action in but one way. Counsel for respondent contends that regardless of that, affirmative action by the order in the lifetime of Richter was essential to forfeit the rights of the beneficiary under the insurance certificate; that Richter was a member of the order when he died, and presumably in good standing; that the contrary could not be legitimately shown otherwise than by the records of the order; that death ended the power of the order to take such action, and that thereby the rights of the beneficiary became fixed. So far as the rights of the beneficiary depend on mere membership ²⁸⁶ of Richter in the order, counsel's position is unquestionably sound. Under the insurance contract expulsion could not take place except upon notice and hearing in the manner provided in the by-laws. Obviously, since such proceedings were impossible after the death of the assured, the termination of his membership *nunc pro tunc* was impossible. Courts have frequently held under similar contracts that the status of a member cannot be shown so as to avoid liability on the certificate or policy of insurance after his death otherwise than by showing by the records of the order that appropriate proceedings were had by it during his lifetime: *Olmstead v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 200, 15 N. W. 82; *Baker v. Citizens' Mut. F. Ins. Co.*, 51 Mich. 243, 16 N. W. 391.

But appellant's counsel contends that the by-law exempting it from all liability upon the certificate in case of any violation by the member to whom it was issued of any law of the order is self-executing; that while social benefits in the order depended upon membership therein, the liability of the beneficiary named in the certificate depended upon both membership of the assured in good standing at the time of his death and freedom of any violation by him of the laws of the order. That contention has not been satisfactorily answered by respondent's counsel, either by argument or by authority.

Whether Richter's transgression of the law of the order *ipso facto* terminated all liability under his certificate of membership depends entirely upon whether that is what the parties to the insurance contract agreed to: *Freckman v. Supreme Council R. A.*, 96 Wis. 133, 70 N. W. 1113; *Niblack on*

Benefit Societies, 2d ed., sec. 289. In disposing of questions of this kind courts must not lose sight of the fact that they do not make insurance contracts for parties, and that in dealing with such a contract their duty is the same as when dealing with any other contract; that they must determine the intention of parties from the words such parties chose to use to express ²⁸⁷ such intention, and give effect thereto so far as the judicial reading does not violate any rule of language or of law; that courts have no right to depart from that line by twisting words out of their natural and sensible meaning for the purpose of saving anyone from the consequences of what may seem to be a harsh stipulation. So it is useless to refer to cases as ruling the question under consideration or as bearing thereon in which the contracts considered were essentially different from the one before us.

The learned counsel for respondent seem not to reply at all in their printed brief to the contention that liability under the certificate was terminated by a violation of the law of the order, except by pointing to the language which shows that affirmative action on the part of the order was necessary to terminate membership, paying little or no regard to the idea that the contract expressly provided for a forfeiture of all liability under the insurance feature of the membership, without necessary loss of social benefits, by actual suspension or expulsion therefrom. The exact wording of the provision of the certificate which seems to apply is as follows: "No liability for the payment of any money from this fund shall arise by virtue of any beneficiary certificate or certificate of membership, or otherwise, unless the member of the order named in such certificate shall, in every particular, while a member of the order, comply with all the laws, rules, and requirements thereof; and shall, at the time of death, be a member of said order in good standing."

That law was, in effect, embraced in the certificate of membership in the following language: "This certificate is issued upon the express condition that Emil Richter shall in every particular, while a member of said order, comply with all the laws, rules, and requirements thereof."

When we consider the quoted by-law in connection with the language of the certificate and the following language ²⁸⁸ in the application for membership, "I agree that compliance on my part with all the laws, regulations, and requirements which are or may be hereafter enacted by said order is the express

condition upon which I am entitled to participation in the beneficiary fund and to have and enjoy all the other benefits and privileges of said order," we have a contract about as plain as language can express it, under which noncompliance with any law of the order ipso facto terminated all liability thereunder. In most, if not all, of the cases where the contract considered provided that nonpayment of dues or any violation of any other requirement of the order should terminate the transgressor's membership or his right to participate in the insurance fund of the order, it was held that the provision was self-executing, requiring no affirmative action of the order to terminate its liability. In all of such cases there were laws of the order also, as in this case, providing for a trial of the guilty member and his punishment by suspension or expulsion or in some other way. The fact in that regard was not the turning point, but the question of whether the contract of insurance provided for its termination solely by the act of the assured.

In High Court I. O. F. v. Zak, 136 Ill. 185, 29 Am. St. Rep. 318, 26 N. E. 593, the certificate considered contained this provision: "This certificate is issued . . . upon condition that the said member complies . . . with the laws, rules, and regulations now governing said order or that may hereafter be enacted by the high court. These conditions being complied with the said high court . . . hereby promises, . . . provided that said member is in good standing in this order at the time of his death."

The constitution of the order defined what should constitute a member thereof in good standing, and in close connection therewith provided that any member not coming up to the constitutional standard, "upon due trial and conviction thereof, shall be reprimanded, suspended, dropped, or expelled as the court or other lawful authority may ²⁸⁹ determine." The court held that, looking to all the provisions of the insurance contract, it provided that good standing should be the test of the right to the benefits under the insurance certificate, and that no penalty could be visited upon a member for any violation of its laws save upon trial and conviction by the law department of the order; hence, that while good standing was a requisite to liability upon the certificate of membership, the only proof admissible to overcome the presumption in favor of such standing was some proper corporate action of the order had during the life of the member whose conduct was

in question. At the same time the court was careful not to impair the force of the decision in *Supreme Council v. Curd*, 111 Ill. 284, where a contract substantially the same as the one before us was considered and it was held that a violation of the law of the order ipso facto terminated its liability to the beneficiary of the transgressor. The court said: "The Curd case is distinguishable from the case at bar because in that case the assured in his application for membership not only agreed that compliance with the laws and regulations of the society should be necessary to entitle him to participate in the fund, but in addition thereto also agreed that violation of his pledge of total abstinence, or suspension or expulsion for a violation of any of the laws should operate as a forfeiture of his right to the fund, because the certificate in the Curd case recited that it was issued to the beneficiary upon the express condition that he should faithfully maintain his pledge of total abstinence and comply with all the laws, rules, and regulations."

It will be readily noticed that the contract in the Curd case was not as strong in favor of the order as the one before us, and, turning to the opinion of the Illinois court in such case, we observe that it was there pointed out, and the decision turned on the fact, that loss of membership by the affirmative action of the society and violation of the contract of insurance were by its terms made independent ²⁰⁰ grounds of forfeiture of the right to participate in the beneficiary fund of the society. The court said: "The words 'shall faithfully maintain his pledge of total abstinence and comply with all the laws, rules, regulations, and requirements of said order,' are used conjunctively, and all these requirements are necessary to be observed to entitle the beneficiary to recover upon the certificate, and so it must follow that the omission of either will bar a recovery. But the certificate proceeds, after the language quoted: 'And in case he is in good standing at the time of his decease, then the person or persons hereinafter named shall be entitled,' etc., and the argument upon behalf of the defendant in error assumes that these words are equivalent to saying that if he is not tried and convicted of violating his pledge, etc. . . . Had it been designed to make trial and conviction a condition precedent to forfeiture, we must presume that it would have been so said; but nowhere is language used that can fairly be construed to mean this. . . . The violation of this pledge is cause for expulsion . . . and it

is also a cause for forfeiture of rights and benefits under the certificate."

That case was followed by High Court I. O. F. v. Zak, when it was first heard on appeal (35 Ill. App. 613), as well as when it was subsequently heard in the supreme court. The appellate court said: "It needs no conviction or expulsion by the lodge in such a case to bar the claim on the certificate, because, by its terms, proof of breach of the specific condition upon which it was issued, ipso facto, forfeited all claim under it." To the same effect are Supreme Council v. Moerschbaecher, 88 Ill. App. 89; Hogins v. Supreme Council C. of R. C., 76 Cal. 109, 9 Am. St. Rep. 173, 18 Pac. 125; McMurray v. Supreme Court K. of H., 20 Fed. 107.

It seems clear that effect must be given to the plain terms of the insurance contract, that proof of a violation of its provisions is a defense to any action to recover thereon. Such provision is as clearly self-executing as are those frequently met with which provide that if a member fails to pay any assessment upon his membership, made in accordance ²⁹¹ with the insurance contract, he shall from the time of such failure stand suspended and no longer a member of the order. The one says compliance with all the laws, rules, and regulations of the order is a condition precedent to any liability thereon; the other, that payment of dues according to the contract is a condition precedent to the continuance of the membership.

No suggestion has been made which from any standpoint reasonably supports a contrary view to that above expressed, except that the law adopted by appellant merely required the expulsion of members as a penalty for entering into the business of selling intoxicating liquor as a beverage, and need not necessarily be construed as prohibiting members from entering into such business, and that therefore the promise of Richter that he would obey all the laws, rules and requirements of the order as a condition precedent to liability to his beneficiary does not necessarily include a promise not to enter into the business mentioned in the law. We are not inclined to treat that suggestion as unworthy of consideration. The by-law did not expressly prohibit members from entering into the business of vending intoxicating liquors. However, it seems that no more strict rules of construction should be applied to it than are ordinarily applied to penal statutes, and we may venture safely to say that such statutes are generally held by necessary

implication to prohibit those things that are made punishable by them; that such implied prohibition exists in all cases where the purpose of the law is to make the act punishable against which it is directed: *Lewis v. Welch*, 14 N. H. 294; *Bancroft v. Dumas*, 21 Vt. 456; *Hallett v. Novion*, 14 Johns. 273; *Mitchell v. Smith*, 1 Binn. 110, 2 Am. Dec. 417. In 1 *Parsons on Contracts*, eighth edition, 458, it is said that Sir James Mansfield established a more reasonable rule than had theretofore existed in England, to the effect that in all cases where a statute provides a penalty for an act, that is a ²⁰² prohibition of the act, and that such "has always been prevailing, if not the uncontradicted, rule of law on this subject in this country."

We must hold that Richter's violation of the law of the appellant order on the subject of entering into the business of selling intoxicating liquors forfeited all benefits under his certificate of membership, and that the circuit court should have rendered judgment in favor of appellant.

By the Court. The judgment of the circuit court is reversed, and the cause remanded, with directions to enter judgment dismissing the complaint with costs.

Benefit Society—Change of By-laws.—On the effect of changes in the by-laws of beneficial associations as to pre-existing members, see the monographic note to *Strauss v. Mutual Reserve Assn.*, 83 Am. St. Rep. 706-720.

Benefit Society—Expulsion of Member.—No member of an association can be expelled, unless for the violation of some provision of the law of the association creating the offense charged and prescribing expulsion as the penalty: *Grand Grove etc. v. Garibaldi Grove*, 130 Cal. 116, 80 Am. St. Rep. 80, 62 Pac. 486. A society cannot affect a member's rights to sick benefits by expelling him on the theory that his claim is fraudulent: *Wuerthner v. Workingmen's Ben. Soc.*, 121 Mich. 90, 80 Am. St. Rep. 484, 79 N. W. 921. A member may recover upon a certificate of insurance, where he has not been convicted in accordance with the rules of the society, nor under general principles of law, as his membership still continues: *Supreme Lodge etc. v. Eskholme*, 59 N. J. L. 255, 59 Am. St. Rep. 609, 35 Atl. 1055. And an action may be maintained by a beneficiary, where void proceedings were had in the member's lifetime for his expulsion, although the order would not recognize the member's right to pay assessments or his connection with the association: *Byram v. Sovereign Camp etc.*, 108 Iowa, 430, 75 Am. St. Rep. 265, 79 N. W. 144. See, further, the monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 576, 577. The duty of an expelled member to exhaust by appeal, or otherwise, all the remedies within the organization arises only when the association is acting strictly within its powers: *Supreme Lodge etc. v. Eskholme*, 59 N. J. L. 255, 59 Am. St. Rep. 609, 35 Atl. 105. See, in this connection, *Byram v. Sovereign Camp etc.*, 108 Iowa, 430, 7 Am. St. Rep. 265, 108 N. W. 430.

ANDREWS v. ROBERTSON.

[111 Wis. 334, 87 N. W. 190.]

PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT THE WORD "DUEBILL," contained in a receipt, referred to a promissory note on which the action was brought. (p. 871.)

NOTICE IS IMPUTED TO A PRINCIPAL of what his agent did within the actual or apparent scope of his agency. (p. 871.)

A PRINCIPAL RATIFIES THE TRANSACTIONS OF HIS AGENT if, having knowledge of the facts, he insists on retaining the benefit of the transaction. If a principal does not intend to ratify the unauthorized act of his agent, he must, upon receiving knowledge of the transaction, repudiate it, and offer to return anything received in consideration of it. (p. 871.)

NEGOTIABLE INSTRUMENTS.—A PURCHASER OF A NEGOTIABLE INSTRUMENT FROM A BONA FIDE HOLDER may generally recover, notwithstanding the knowledge by such purchaser of facts which, if known to the innocent holder, would have defeated his recovery. (p. 871.)

NEGOTIABLE INSTRUMENTS—PURCHASE OF BY THE ORIGINAL PAYEE FROM A BONA FIDE HOLDER.—If the original payee of a negotiable instrument transfers it to a bona fide holder, by whom it might be asserted notwithstanding the defenses of which the original payee had knowledge, the latter, on repurchasing it, does not succeed to the rights of the innocent holder, but is subject to all defenses which might have been asserted against him if he had never made any transfer. (p. 872.)

Action by plaintiffs, who are agents of the Equitable Life Insurance Society, on a promissory note delivered to one Forsting, agent of the plaintiffs, in payment of two insurance bonds issued by that society. The defense was that the bonds were issued and the note given subject to an agreement with Forsting that the defendant might, within thirty days, return the bonds and receive back his note, that the defendant made an election to return within the time specified, informed plaintiffs thereof, and offered to return the bonds, and asked for the surrender of the note. The evidence tended to show that the defendant dealt with Forsting, believing him to be the agent of the plaintiffs, and received from him a receipt as follows: "Received from D. H. Robertson note for six hundred dollars balance due on bonds Nos. B836,811 and 851,882. It is understood and agreed that should the above-numbered bonds be returned not accepted within thirty days, due bill will be returned to D. H. Robertson." Evidence was offered, but excluded by the court on the objection of the plaintiffs, that the word "duebill" as used in the receipt referred to the

note sued upon. The evidence also tended to prove that the plaintiffs did not know of the agreement between the defendant and their agent until after they sold the note, and that, upon being informed of defendant's claim, they repurchased the note of their indorsee before its maturity. Verdict and judgment for the defendant and the plaintiffs appealed.

Bashford, Aylward & Spensley, for the appellants.

H. W. Chynoweth, for the respondent.

336 MARSHALL, J. The view we take of this case renders it unnecessary to consider the question of whether the instrument sued on ever became the promissory note of respondent. Conceding that it did, it is not enforceable in the hands of plaintiffs if the condition on which it was delivered to their agent, Forsting, is binding upon them, upon the ground that they are not bona fide holders of the paper. What that condition was is too clear for controversy. It was competent to show that the word "duebill," found in **337** the receipt given by Forsting, referred to the note, upon the plainest principles of evidence; so, there can be no question but that the delivery of the note was made upon condition that if respondent elected to and did return the bonds as not satisfactory, within thirty days, it should be delivered back to him.

It is said appellants became the bona fide holders of the note because they paid full value therefor to their principal without notice of the condition upon which it was taken for them by Forsting. True they did not have actual notice of such condition, but by well-settled principles of law they had constructive notice, if what Forsting did was within the actual or apparent scope of his agency; and if it was not, they are chargeable just the same and are bound accordingly, because they insisted on reaping the benefit of his transaction after having knowledge of the facts. Upon receiving such knowledge, if they did not intend to ratify such transaction, they should have promptly repudiated it and offered to return the note: *McDermott v. Jackson*, 97 Wis. 64, 72 N. W. 375; *Wilson v. Groelle*, 83 Wis. 530, 53 N. W. 900; *Perkins v. Boothby*, 71 Me. 91; *First Nat. Bank v. Oberne*, 121 Ill. 25, 7 N. E. 85; *Mechem on Agency*, sec. 167.

The further claim is made that plaintiffs are bona fide holders of the paper because they purchased it from their indorsee, who was an innocent holder thereof, paying full value therefor, and that the trial court erred in refusing to

permit proof of such repurchase for value. In that, they invoke the familiar common-law rule, which has recently been added to the statute law of the state (Laws 1899, c. 356, sec. 1676—28) that the holder of commercial paper may recover on the strength of the title of a precedent innocent holder, regardless of knowledge on his part of fraud which would defeat it in the hands of the payee named therein: *Verbeck v. Scott*, 71 Wis. 59, 64, 36 N. W. 600. That rule is stated in the books, particularly in judicial opinions, generally in such a ³³⁸ way as to lead one astray who is not familiar with the law on the subject, as to the extent of its application. It is not a universal rule. It does not apply to a case like this, where the payee of the paper, being so circumstanced at the start that he cannot recover thereon, transfers it to an innocent third party for value and subsequently purchases it back for value. Under such circumstances the payee cannot lean for support on the innocence of his vendee. His position is the same when he comes into possession of the paper the second time as when he first possessed it. One would say that must be the law without reference to authority; otherwise a person might become possessed of a promissory note of another by the grossest of frauds, and by selling it to an innocent third person for value and subsequently repurchasing it enforce the same against the maker. The law contains no such open door as that for the successful perpetration of fraud: *Tod v. Wick*, 36 Ohio St. 370; *Sawyer v. Wiswell*, 9 Allen, 39; *Kost v. Bender*, 25 Mich. 518; *Vorce v. Rosenbery*, 12 Neb. 448, 11 N. W. 879; *Chariton Plow Co. v. Davidson*, 16 Neb. 374, 20 N. W. 256; *Camp v. Sturdevant*, 16 Neb. 693, 21 N. W. 449. We are unable to find that the rule contended for by appellants has ever been applied to a case like this. If authority to that effect could be found, we would be compelled to reject it as out of harmony with the settled law on the subject and contrary to every principle of justice upon which the law is founded.

By the Court. The judgment of the circuit court is affirmed.

Ratification of Agent's Acts.—Accepting and retaining the benefits of an unauthorized contract of an agent, with full knowledge, constitutes ratification: *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *Eastman v. Provident etc. Assn.*, 65 N. H. 176, 23 Am. St. Rep. 29, 18 Atl. 745. An unauthorized act may be ratified

by implication if the principal does not repudiate it as soon as fully informed. It is his duty, then, to repudiate the act: *Ward v. Williams*, 26 Ill. 447, 79 Am. Dec. 385, and note.

Bills and Notes.—Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established. The holder can transfer it to others with like immunity though they have notice of defenses that may have existed between antecedent parties: *Herman v. Gunter*, 83 Tex. 66, 29 Am. St. Rep. 632, 18 S. W. 428; monographic note to *Bedell v. Herring*, 11 Am. St. Rep. 322, 323.

HYLAND v. ROE.

[111 Wis. 361, 87 N. W. 252.]

BANKING.—AN OFFICER OR AGENT OF A BANK WHO RECEIVES A DEPOSIT IN DISOBEDIENCE OF A STATUTE and neglects to perform a duty imposed thereby is personally liable for all damages resulting proximately from such disobedience or neglect. (p. 874.)

BANKING.—AN ACCEPTANCE OF A DEPOSIT BY A BANK WHICH IS INSOLVENT, and therefore by a statute forbidden to continue in business, constitutes such fraud as entitles the depositor to reclaim his money. Such bank cannot honestly continue in business and receive the money of its customers. (p. 874.)

BANKING.—A DEPOSIT OF MONEY DOES NOT VEST THE TITLE THERETO IN THE BANK and convert the depositor into a general creditor, if it is at the time insolvent, and for that cause forbidden by a statute of the state to receive deposits. The depositor may elect to rescind the transaction and recover his money. (pp. 876, 877.)

BANK, INSOLVENT—IDENTIFICATION OF DEPOSIT FOR THE PURPOSE OF RECOVERY.—If the holder of a check deposits it in a bank which, because of its insolvency, has no right to do business, and receives a portion thereof in cash and the balance in a certificate of deposit, and the receiving bank transmits the check to a drawing bank for payment, but it, to the extent of the sum named in the certificate of deposit, remains unpaid until after the insolvent bank closes its doors and has passed into the hands of a receiver, such balance remains capable of identification, and, if subsequently paid to the receiver, may be recovered from him by the depositor on surrender of the certificate of deposit. (pp. 877, 878.)

RESCISSION, WHEN OFFER TO RETURN NECESSARY. One who deposits a check in an insolvent bank, receiving a part of the amount in money and the balance in a certificate of deposit, and who wishes to rescind because of such insolvency, need not offer to return the amount actually received, where he seeks to recover the balance only. (p. 878.)

RESCISSION PENDING OFFER TO RETURN.—In a proceeding equitable in its nature to recover moneys deposited in

an insolvent bank for which the depositor received a certificate of deposit, a demurrer is properly sustained, if there is no allegation of an offer to surrender such certificate. (p. 878.)

Petition for an order directing the receiver of the Dane County Bank to pay petitioner certain funds. In June, 1899, he held a check drawn by G. F. Tallard on the Tobacco Exchange Bank for twelve hundred and eighty-four dollars and ten cents and delivered it to the president of the Dane County Bank, receiving a certificate for one thousand dollars and the balance in cash. At that time the bank was insolvent and was known to be so by its president. On the following day it closed its doors and a receiver was appointed. On the next day the Tobacco Exchange Bank placed two hundred and eighty-four dollars and ten cents to the credit of the Dane County Bank, but the remainder of the check was held till November, 1899, and then paid to the receiver. To a petition disclosing these facts the court sustained a demurrer. The petitioner appealed.

Sanborn, Luse & Powell, for the appellant.

Olin & Butler, for the respondent.

³⁶⁴ BARDEEN, J. The first point made against the sufficiency of the petition is that there is no sufficient averment of fraud to authorize a rescission of the transaction. The facts show that the bank was a going concern, and had been for some years transacting a large business and receiving large sums for deposit; that it was conducted by its president, O. M. Turner, who had the confidence of the people in and about the city of Stoughton; that it was advertised by said bank and its officers that it was a safe banking institution; that from time to time the claimant had done business with the bank, and believed that it was a safe and solvent bank; that at the time of said deposit it was hopelessly insolvent, and had been for several months prior to that time, and that said Turner knew, and had good reason to believe, that it was insolvent and unsafe. The demurrer admits the truth of these facts. Section 4541 of the Statutes of 1898 makes it a penal ³⁶⁵ offense for an officer of a bank to receive money on deposit when he knows, or has good reason to know, that the bank is unsafe or insolvent. The officer or agent of the bank who disobeys the statute or neglects to perform the duty imposed thereby, to the injury of a depositor, is personally liable for all damages resulting proximately from such disobedience or

neglect: *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797. Bankers are held to a rigid responsibility for good faith and honest dealing. The acceptance of a deposit by a bank irretrievably insolvent constitutes such a fraud as entitles the depositor to reclaim his money if he brings himself within the rules of law hereinafter to be mentioned. A bank hopelessly insolvent cannot honestly continue its business and receive the money of its customers; and, although there may be no intent to cheat and defraud a particular customer, it will be held to have intended the inevitable consequence of its act, which is to cheat and defraud all persons whose money it receives and whom it fails to pay before it is compelled to stop business: *St. Louis etc. Ry. Co. v. Johnson*, 133 U. S. 566, 10 Sup. Ct. Rep. 390. This court has spoken on this subject in language too plain to be misunderstood. In *Baker v. State*, 54 Wis. 368, 12 N. W. 12, the following language is used: "A bank implies capital, and capital invites confidence. A man holding himself out as a banker or broker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession and subject to his control, and for that reason he may be fully trusted. It requires no argument to show that such assurance is most inviting and influential with the mass of the people, especially with those unacquainted with the history and character of the man. With them the banker or broker is intrusted with money simply because he is a banker or broker, and hence supposed to have surplus capital as a standing guaranty of his agreements and his integrity. For an insolvent banker, company, or corporation to continue the business of banking is to hold out assurance of responsibility and surplus capital where neither exists. To do so knowingly is to secure the confidence, and hence obtain the ³⁶⁶ money, of the ignorant and unwary by an implied deception. It is the old story of securing the victim by a display of false colors."

Banks stand upon a somewhat different footing from individuals. This difference is indicated by the language just quoted. Moreover, a bank is prohibited by law from continuing business after it has become insolvent. This is the effect of the statute. Not so as to an individual engaged in his private business. As said in *David Adler & Sons Co. v. Thorp*, 102 Wis. 70, 78 N. W. 184, the individual may have "an honest, though abortive, purpose to continue business," though founded in delusion and unreasonable expectation, and

yet not be guilty of a fraud. In such a case, mere knowledge of insolvency, unaccompanied with false statements or artifices to deceive the trusting, is not considered fraudulent. Under the statute the bank has no right to continue business when its officers know, or have good reason to know, that it is unsafe or insolvent. If it does continue business, then the intent to cheat and defraud whoever deals with it irresistibly arises. The dishonest purpose comes from the knowledge of the officers, and extends to all persons having dealings with the bank, and it is immaterial whether there was or was not a distinct intent to cheat or defraud a particular customer; otherwise, the bank might hide behind the alleged bona fides of the official, and the very purpose of the statute be defeated.

Another reason suggested why the petition is insufficient is that there is no sufficient identification of the proceeds of the check to authorize the relief demanded. Since the decision in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383, if the fund sought to be secured has been disposed of by the banker before the funds have come to the possession of the assignee or receiver, or it has been so mixed with other funds as to lose its identity, it cannot be reclaimed: *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96; *Thuemmler v. Barth*, 89 Wis. 381, 62 N. W. 94; *Stevens v. Williams*, 91 Wis. 58, 64 N. W. 422; *Dowie v. Humphrey*, 91 Wis. 98, 64 N. W. 315. Therefore, there can be no recovery in this proceeding unless the money sought to be secured can be identified as the proceeds of the Tallard check with such certainty as to bring it without the line of the decisions cited. The decision of the trial judge was that when the check was deposited the title passed to the bank, and the claimant then stood in the position of a general creditor. He says: "Though the transaction between him and the bank was in fact tainted by fraud, yet the title to the money by him deposited passed to the bank, and left him, when the bank closed its doors, as it did all others who deposited money within the period when the bank was insolvent—namely, a general creditor, to share pro rata out of the fund realized from the assets of the bank."

This court has never denied relief in such cases on the ground that the title to the money, draft, or check had passed to the bank. The decisions are based rather upon the fact that the claimant has been unable to identify the specific fund or thing demanded and trace it into the hands of the receiver or assignee of the estate; that is, the trust did not impress

itself upon the whole corpus of the estate, but only followed the specific thing itself. If that could not be traced and identified, no relief was granted. The following language from the opinion in *Burnham v. Barth*, 89 Wis. 362, 62 N. W. 96, seems to cover the rule established in this state: "Since the decision of the court in the case of *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383, and *In re Plankinton Bank*, 87 Wis. 385, 58 N. W. 784, it must be regarded as settled, in this state at least, that, in order that the beneficiary or owner of a trust fund may be able to regain it out of the estate of a defaulting and insolvent trustee, he must be able to trace it into, and satisfactorily identify it in, the hands of the assignee or receiver of his estate, or its substitute or substantial equivalent; that when the trust fund has been dissipated or so confounded and mixed up with the property and estate of the trustee that it cannot be traced or identified, there remains nothing to be the subject of the trust."

368 No doubt the title of the check passed under the terms of the transaction alleged, but that title was subject to be defeated and the check reclaimed by showing fraud. If, while the bank had possession of this check, Mr. Hyland had demanded its return and offered to make return of that which he had received, his right would have been unquestionable, conceding the insolvency of the bank. Had the check been turned over to the receiver, the claimant's right would have been just as absolute, for the receiver would get no better title than the bank had. The check deposited was but the evidence of a debt due from the Tobacco Exchange Bank to Mr. Hyland. The proceeds of that check never came to the possession of the bank, and were never intermingled with its funds. The fact that the bank fraudulently attempted to account to Hyland for the proceeds does not alter the situation. It was the money due on that check that he was entitled to. The bank advanced to him a portion thereof in anticipation of its payment. That sum was repaid by draft sent to the Milwaukee bank. When the doors of the bank closed, there was the sum of one thousand dollars still in the hands of the Edgerton bank, which had not been paid over. The bank's claim to it was based upon a transaction alleged to have been fraudulent. The right of Mr. Hyland to rescind the transaction and to reclaim his money was absolute, if such fraud was proven. That right cannot be defeated by a mere system of credits. It is only when the identity of the fund has been lost, when it has

been dissipated, or so confounded and mixed up with other funds that it cannot be traced, that it cannot be reclaimed. One thousand dollars of this specific fund had never reached the vaults of the defunct bank. While it was held by the debtor, the real owner made an attempt to reclaim it. By his request it was held by the debtor for some months. When it was paid over to the receiver, it was not a payment on an account due the Dane County Bank, but the payment of ³⁶⁹ the unpaid portion of the Tallard check. It came to the hands of the receiver as such, and in equity must be deemed to be held by him subject to the rights of Hyland thereto. It seems to us that the identification of the fund is complete in his hands, and the right of the claimant thereto absolute, under the rules heretofore stated, provided, of course, the facts alleged are sustained by proper proof.

What has been said is based upon the supposition that the claimant has placed himself in position to command the aid of a court of equity. This however, is denied by the receiver, who claims that the petition is insufficient, because it contains no offer to do equity, and does not show an offer of rescission or that it is within the power of the claimant to completely rescind the transaction. Referring again to the facts, it appears that when the check was deposited the claimant received two hundred and eighty-four dollars and ten cents in cash and a certificate of deposit for one thousand dollars. Presumably, this certificate was negotiable paper. The petition contains no allegation that the claimant is the owner and holder thereof, no offer to return, or allegation that he is in a position to return it. Neither does it allege any offer to return the money received. The receiver invokes the well-known rule that, before a contract can be rescinded, the party claiming the benefit of such rescission must allege an offer to return what he received, or a readiness to return the same; or, instead of such offer, that he elected to rescind the contract and the other party denied his right to do so. As regards the return, or offer to return, the money received, no good reason exists why it should be done or made. The petition shows that the Tobacco Exchange Bank paid the Dane County Bank two hundred and eighty-four dollars and ten cents by draft to its credit at the Marshall & Ilsley Bank at Milwaukee. This effectually wipes out that item, and leaves the case free from any supposed complications arising therefrom. It would be far from equitable to require the claimant ³⁷⁰ to return, or

offer to return, that which the bank has already received. This does not in any way conflict with the rule of total rescission. What was said on this subject in the recent case of *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571-582, sufficiently answers the contention of counsel on this point.

The proceeding is equitable in its nature, and the claimant ought not to succeed without a showing that the estate in the hands of the receiver will not suffer beyond the liability claimed. The petition simply alleges a demand on the receiver for this one thousand dollars as the proceeds of said check, and a refusal to pay. It does not appear that this demand upon the receiver was made upon a claim of a rescission of the former transaction, or that the refusal to pay was based upon a denial of the right of rescission, so as to bring the case within *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678. Nor do the allegations of the petition bring it within that class of cases of which *O'Dell v. Burnham*, 61 Wis. 562, 21 N. W. 635, is a type, where an offer to tender back money was not made before action brought. In this case the plaintiff offered to do so in his complaint, and it was held that the objection that he had not done so before suit was not available after the matter had gotten into court. At most, it could only affect the question of costs. Nor should the situation be confused with another class of cases, where the willingness or readiness to restore is not alleged in the complaint, and the absence of such allegations was not taken advantage of by demurrer. Where restoration is a mere matter of administration in a suit that has been litigated, the court can very easily preserve the rights of the parties by requiring restoration as a condition of relief. But when the sufficiency of the pleading is tested by demurrer, a stricter rule is applied, and the party seeking relief must affirmatively show a readiness and willingness to do equity in order that his pleading shall withstand the test. This is necessary to prevent fruitless trials and the expense of useless litigation. ³⁷¹ The rule of pleading in this regard seems to be correctly stated in 18 *Encyclopedia of Pleading and Practice*, 829: "The plaintiff will not be permitted to repudiate his contract and still retain the benefits which he has derived from it; and his desire and willingness to restore what he has received must appear in the bill or complaint; otherwise he will have no standing in a court of equity."

Again (page 831): "It is for the plaintiff to show clearly that he can restore to the defendant all that he has received

under the contract, and that the parties can be placed in statu quo, and it is not for the defendant to show that it cannot be done": *Davis v. Tarwater*, 15 Ark. 286.

In *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571, this language is used: "It is sufficient, in an action for rescission, to show in the complaint a willingness to do equity, to submit to a complete rescission so far as practicable, and to make the defendant good for what was received from him in such manner as the court may direct": See *Eslava v. Elmore*, 50 Ala. 587; *Mohawk etc. R. R. Co. v. Clute*, 4 Paige, 384. In order to secure relief in a court of equity, a party must so frame his pleading as to indicate a willingness that the court may deal with him as well as the defendant on such terms as to do complete justice. A failure to offer to do equity where some affirmative action is necessary to restore the former condition or put the parties on an equality renders the pleading demurrable. The certificate of deposit was sufficient as a foundation for a claim to dividends. The receiver was bound to protect his estate against double claims. The order of the court below must be sustained upon the sole ground that the petition is insufficient, in that it fails to meet the rule in equity above mentioned. The order of the trial court gives the privilege of amendment, and it will undoubtedly be an easy matter for the claimant to amend his petition in the particulars referred to.

By the Court. The order is affirmed, and the cause is remanded for further proceedings according to law.

Banking.—To permit a deposit in a bank in reliance upon its supposed solvency is a gross fraud, if its officers know at the time of its insolvency. The depositor is entitled to reclaim the deposit or the proceeds: *Grant v. Walsh*, 145 N. Y. 502, 45 Am. St. Rep. 626, 40 N. E. 209. He may maintain replevin for the money if it can be identified: *Corn etc. Bank v. Solicitors' Loan etc. Co.*, 188 Pa. St. 330, 68 Am. St. Rep. 872, 41 Atl. 536. A depositor may recover from the directors damages resulting to him from negligence in permitting the bank to be held out to the public as solvent, when it is insolvent: *Delano v. Case*, 121 Ill. 247, 2 Am. St. Rep. 81, 12 N. E. 676; *Seale v. Baker*, 70 Tex. 283, 8 Am. St. Rep. 592, 7 S. W. 742. But they are not personally liable in an action of deceit for a false statement of the financial condition of the bank made under a statutory requirement, when the statement is made in good faith upon details furnished by the cashier, whose reputation was good: *Utley v. Hill*, 155 Mo. 232, 78 Am. St. Rep. 569, 55 S. W. 1091. For criminal prosecutions for fraudulent banking, see *State v. Elfert*, 102 Iowa, 188, 63 Am. St. Rep. 433, 65 N. W. 300, 71 N. W. 248; *State v. Shove*, 96 Wis. 1, 65 Am. St. Rep. 17, 70 N. W. 312.

NELSON v. STATE.

[111 Wis. 394, 87 N. W. 235.]

MINORS, DEALING IN INTOXICATING LIQUORS WITH, WHAT IS.—If an adult, accompanied by a minor, applies to a seller of intoxicating liquors for liquor to be drunk at his expense for both himself and the minor, and the dealer thereupon furnishes it to be used by both, he is guilty of dealing or trafficking in intoxicating liquor with a minor. (p. 883.)

STATUTES, PENAL, CONSTRUCTION OF.—Strict construction also permits sensible construction having in view the purpose of the law to be construed, and when that purpose is manifest, strict construction does not militate against any departure from the primary meaning of words within the reasonable scope thereof. (p. 883.)

Prosecution and conviction for violating the statute of the state referred to in the opinion respecting the dealing or trafficking in liquors with minors. The minor and two adults entered defendant's saloon to obtain intoxicating liquors to be there drunk. One of these adults applied for drinks for the whole party, and the liquor was thereupon furnished to and drunk by all, including the minor. The trial court instructed the jury as stated in the opinion.

G. M. Perry and J. G. Forbes, for the plaintiff in error.

The Attorney General and E. N. Warner, for the defendant in error.

³⁹⁶ MARSHALL, J. The only material question sufficiently presented by the record to permit us to consider it is, Did the trial court err in instructing the jury, in effect, that if an adult accompanied by a minor applies to a dealer in intoxicating liquor at his saloon for such liquor, to be drunk by him and his associate at his expense, and the dealer furnishes it for that purpose, and it is drunk by the two, the adult treating his companion, the vendor is guilty of dealing or trafficking in intoxicating liquor with a minor, within the meaning of section 1557 of the Statutes of 1898, which says that "any keeper of any saloon for the sale of any strong, spirituous, or malt liquors to be drunk on the premises, in any quantity less than one gallon, who shall sell, vend, or in any way deal or traffic in or give away any spirituous, ardent, intoxicating or malt liquors or drinks in any quantity whatsoever to or with a minor shall be punished," etc.? Counsel for

plaintiff in error cite to our attention authority in support of their assignment of error, and the attorney general refers to many authorities in support of a contrary view. We do not deem it necessary to review such authorities at length, because the statutes considered therein are not as broad and comprehensive as the statute of this state upon which the challenged instruction was based. However, a brief reference to some of such authorities and others will show that, as a rule, courts have been inclined to give such construction to statutes aimed at preventing the use of intoxicating liquors by minors as will fully carry out the legislative purpose in that regard so far as reasonably expressed, even though it requires a departure from the literal or ordinary meaning of words.

397 In *State v. Freeman*, 27 Vt. 520 (opinion by Redfield, C. J.), "furnishing" liquor to a minor by a dealer was held to include "giving" liquor to him. In *Dukes v. State*, 77 Ga. 738, it was contended that the word "furnish" contemplates a sale, but the court held that it was used in the Georgia statute in its broad sense and included giving. In *Commonwealth v. Davis*, 12 Bush, 240, the word "give" was held to mean, in its strict sense, the bestowal of something of value by one person upon another as a gratuity, but that as used in the Kentucky statute in regard to giving intoxicating liquors to minors, it was used in connection with the word "sale" and the word "loan" so as to include the other methods of enabling a minor, by the aid of another, to procure intoxicating liquor. In that case the accused purchased liquor with money belonging to himself and the minor, and then delivered part of the joint property to the minor for his use. The court said, in effect, that to give to the words of the statute their strict primary signification would render it ineffective, and defeat the plain legislative purpose thereof by enabling minors to readily procure intoxicating liquor by using a purchasing agent to obtain it of the dealer with their money, and that such a result was so foreign to the manifest purpose of the legislature that the court would not adopt a construction that would lead to it if one could be found within the reasonable scope of the language of the statute which would prevent it. To the same effect are *Walton v. State*, 62 Ala. 197; *Topper v. State*, 118 Ind. 110, 20 N. E. 699; *State v. Scoggins*, 107 N. C. 959, 12 S. E. 59; *State v. Munson*, 25 Ohio St. 381. In the last case cited it was held that if an adult, accompanied by a minor, applies at the counter of a saloon for liquor to be drunk by him

and his associate at his expense, and the person in charge hands out the article applied for by turning out a drink for each, such person is guilty of furnishing liquor to a minor under the statute prohibiting it; that though in a sense the adult furnishes the liquor, the dealer, ³⁹⁸ by supplying it under the circumstances, in legal effect furnishes it to the minor the same as the purchaser, upon the principle that all persons participating in the commission of a misdemeanor are principals. In *Walton v. State*, 62 Ala. 197, it was said that inventions and attempted evasions of the law cannot succeed by invoking the rule of strict construction, where the real purpose of the legislature is plain and the reasonable meaning of the words used is broad enough to prevent it; and that all persons knowingly participating in providing intoxicating liquor to be drunk by a minor are guilty of furnishing it to him within the meaning of the statute; that the one who sells the liquor to enable the vendee to give it to the third person, who is a minor, is guilty as well as the vendee.

A contrary view was expressed in *Siegel v. People*, 106 Ill. 89, and seems to have been adopted without study of the subject in *Black on Intoxicating Liquors*, section 406. Such view was criticised in *People v. Neumann*, 85 Mich. 98, 48 N. W. 290, the court saying that the reasoning upon which it was based was unsatisfactory and could not be adopted without careful consideration, even if a statute like the Illinois law were under consideration, and not at all as to the more comprehensive law of Michigan. In the Michigan case, a law prohibiting the furnishing of liquor to a minor was held to be violated by the sale of liquor to an adult to be furnished to the minor by treating him, as in this case, the decision being based in whole or in part on the principles which rule the cases to which we have referred.

Our statute is broader even than the Michigan law or any considered in such cases. In addition to the prohibition of a person circumstanced as plaintiff in error was from selling or giving away intoxicating liquor to minors, any dealing or trafficking therein with them is prohibited. The word "deal" was obviously used *ex industria* to include all acts directly with minors in furnishing intoxicating liquors ³⁹⁹ to them. The word "deal," as applied to intercourse *inter partes*, includes any transaction of any kind between them: *Webster's Dictionary*. The act of setting out liquor for another to drink at the request of a third person is a dealing with such other

as clearly as giving or selling it to him. So "deal" includes the terms ordinarily used in statutes held, as we have seen, to cover the act complained of, and every other transaction with a minor to enable him to obtain liquor at a saloon bar. The legislative purpose is plain—to prevent, so far as practicable, minors from becoming victims of the corrupting influence of the saloon, and to leave as little room as possible for evasions of such purpose. To that end language was used covering every transaction with a minor inconsistent with such purpose, and it is the duty of the court to give full effect to that wise policy so far as reason will permit. That is consistent with the doctrine that penal statutes and those contrary to the common law should be strictly construed, because strict construction of a law always permits sensible construction, having in view the purpose of the law to be construed; and when that purpose is manifest, strict construction does not militate against any departure from the primary meaning of words within the reasonable scope thereof. Moreover, as we have indicated, the instruction given by the court, of which complaint is made, is in accord with the primary sense of the words of our statutes forming the subject of the instruction. In this case plaintiff in error not only handed out the liquor to be drank by the minor, but actually placed the filled glass in his hands, thereby dealing with him in the strictest sense of the term, even though it was done at the request and at the expense of another. We see no ground for criticising the instruction complained of.

By the Court. The judgment of the circuit court is affirmed.

Sale of Liquor to Minor.—If a saloon-keeper, at the instigation of one who pays therefor, delivers intoxicating liquor to a minor, he, as well as the person paying for the liquor, is guilty of a misdemeanor under the laws of Indiana: *Note to Snider v. State*, 12 Am. St. Rep. 354.

Penal Statutes.—The rule of strict construction is not violated by giving the words of a penal statute a reasonable meaning according to the sense in which they were intended: *Meadowcroft v. People*, 163 Ill. 56, 64 Am. St. Rep. 447, 45 N. E. 303.

WISKIE v. MONTELLO GRANITE COMPANY.

[111 Wis. 443, 87 N. W. 461.]

MASTER AND SERVANT—FELLOW-SERVANTS—TESTS TO DETERMINE WHO ARE.—Whether one servant injured by the negligence of another is a fellow-servant with the latter does not depend upon their respective grade or rank, but upon the nature of the services being performed and in which the negligence occurs. (p. 886.)

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE.—A foreman in a blasting quarry and those who assist him are fellow-servants, and the latter cannot recover for injuries received through the negligence of the former. (p. 888.)

MASTER AND SERVANT—RISK ASSUMED BY SERVANT.—Where a servant works in a blasting quarry for fourteen years with the same foreman, and all the time in the same character of service and having the same relation to each other, the servant assumes the risk of injury from the negligence of the foreman. (p. 888.)

Action to recover for injuries received by the plaintiff when employed in defendant's granite quarry from an unexpected explosion of a powder blast. The plaintiff claimed that such explosion was due to the negligence of one Pender, who was plaintiff's foreman, and who had personal charge of the work in the quarry, and there worked with the plaintiff and other employes under his direction. On Friday, Pender prepared a blast and it exploded. Some three days later plaintiff was sent to work with a hammer at the same place, and, on striking with it, a further explosion occurred, destroying his eyesight for some weeks and otherwise injuring him. The trial court directed the entry of a nonsuit, and the plaintiff appealed.

Fowler & McNamara, for the appellant.

Turner, Pease & Turner, for the respondent.

448 CASSODAY, C. J. The gist of the complaint is that the defendant negligently failed to furnish to the plaintiff a reasonably safe place in which to work, and to keep and maintain the same in a reasonably safe condition. This is made more plain by the allegations therein to the effect that Pender improperly prepared the blast; that he knew, or ought to have known, that it had not wholly exploded on Friday; that that made it his duty to renew the blast, as stated in the expert testimony; that he negligently failed to do so, and then negli-

gently and carelessly set the plaintiff to work on the rock on Monday to remove and separate the same from the main body by glutting, as indicated in ⁴⁴⁹ the testimony. In other words, the negligence complained of is the negligence of Pender, who, with the assistance of the plaintiff, prepared the blast on Friday. Pender and the plaintiff had together worked in that quarry for fourteen years prior to the accident. During that time Pender had had charge of the men, and personally conducted the blasting. In doing so he was assisted by others, including the plaintiff. Such blasting occurred two, three, or four times a week, and sometimes two, three, or four times a day. Never before the occasion in question had a blast failed to fully explode. There is no pretense of any negligence on the part of the defendant, except in what Pender so did and so omitted to do on the occasion in question. The question recurs whether the plaintiff can recover from the defendant by reason of such negligence on the part of Pender.

The defendant contends that there can be no recovery, by reason of the fact that the plaintiff and Pender were coemployés in the work of such blasting. The plaintiff contends that they were not co employés. All must agree that at common law the master is not responsible for injury to a servant caused wholly by the negligence of a fellow-servant. Courts differ widely, however, as to who constitute such fellow-servants. In this state, and most of the other states, it is firmly settled that it does not depend upon the grade or rank of the servant whose negligence caused the injury, but upon the nature of the service being performed by them and in which the negligence occurs: *Dwyer v. American Exp. Co.*, 82 Wis. 307, 33 Am. St. Rep. 44, 52 N. W. 304, and cases there cited; *Kliegel v. Weisel etc. Mfg. Co.*, 84 Wis. 148, 53 N. W. 1119; *Stutz v. Armour*, 84 Wis. 623, 54 N. W. 1000; *Hartford v. Northern Pac. Ry. Co.*, 91 Wis. 374, 379, 64 N. W. 1033; *Prybilski v. Northwestern etc. Ry. Co.*, 98 Wis. 413, 74 N. W. 117; *Dahlke v. Illinois S. Co.*, 100 Wis. 431, 76 N. W. 362; *Portance v. Lehigh Valley C. Co.*, 101 Wis. 574, 70 Am. St. Rep. 932, 77 N. W. 875; *Adams v. Snow*, 106 Wis. 152, 81 N. W. 983; *Mielke v. Chicago etc. R. R. Co.*, 103 Wis. 1, 5, 6, 74 Am. St. Rep. 834, 79 N. W. 22; *Lierman v. Milwaukee D. D. Co.*, 110 Wis. 599, 86 N. W. 182. For earlier ⁴⁵⁰ cases in this court, see *Toner v. Chicago etc. Ry. Co.*, 69 Wis. 197, 198, 31 N. W. 104, 33 N. W. 433. The rule stated is mentioned in a standard work as the "approved doctrine," and the authori-

ties cited from most of the states and the English courts justify the statement: 12 Am. & Eng. Ency. of Law, 2d ed., 933-942. The supreme court of the United States has repeatedly affirmed the rule mentioned, especially during the last few years: *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 379-390, 13 Sup. Ct. Rep. 914; *Central R. R. Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. Rep. 269; *Northern Pacific R. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. Rep. 843; *Northern Pacific R. R. Co. v. Charless*, 162 U. S. 359, 16 Sup. Ct. Rep. 848; *Martin v. Atchison etc. R. R. Co.*, 166 U. S. 399, 17 Sup. Ct. Rep. 603; *New England R. R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. Rep. 85. See, also, *Stevens v. Chamberlain*, 100 Fed. 378, 51 L. R. A. 513, and note. These cases overrule *Chicago etc. R. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, and disapprove the rule in force in Ohio and some other states. In most of the cases cited the foreman or manager of the work was the person guilty of the negligence complained of. Thus the supreme court of the United States has expressly held that: "A common day laborer in the employ of a railroad company, who, while working for the company, under the order and direction of a section boss or foreman, on a culvert on the line of the company's road, received an injury by and through the negligence of the conductor and of the engineer in moving and operating a passenger train upon the company's road, is a fellow-servant with such engineer and such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted": *Northern Pacific R. Co. v. Hambly*, 154 U. S. 349, 355, 356, 14 Sup. Ct. Rep. 983.

In that case Mr. Justice Brown, speaking for the court, states the rule as indicated, and cites cases in support of it from fifteen states, including Wisconsin. He also cites cases holding the contrary doctrine. That case is quite similar in its facts and ruling to *Cooper v. Milwaukee etc. Ry. Co.*, 23 Wis. 668, and *Toner v. Chicago etc. Ry. Co.*, 69 Wis. 197-199, 31 N. W. 104, 33 N. W. 433. So in a more recent case the supreme court of the United States has held that: ⁴⁵¹ "Where the business of a mining corporation is under the control of a general manager, and is divided into three departments, of which the mining department is one, each with a superintendent under the general manager, and in the mining department are several gangs of workmen, the foreman of one of these gangs, whether he has or has not authority to engage

and discharge the men under him, is a fellow-servant with them; and the corporation is not liable to one of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men": *Alaska Min. Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. Rep. 40.

Counsel cite *Promer v. Milwaukee etc. Ry. Co.*, 90 Wis. 215, 48 Am. St. Rep. 905, 63 N. W. 90, in support of their contention that the defendant is responsible for the negligence of Pender. But that case has recently been limited to the proper selection and instruction of a sufficient number of competent servants to properly do the work: *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 579, 70 Am. St. Rep. 932, 77 N. W. 875. Counsel insist that this case is ruled by *McMahon v. Ida Mining Co.*, 95 Wis. 308, 60 Am. St. Rep. 117, 70 N. W. 478. In our judgment, that case is clearly distinguishable from the case at bar. In the statement of the case it is said: "The gist of the complaint is that the plaintiff was set to work by a shift boss in a certain part of the mine where there were concealed unexploded blasts known to the shift boss, but not to the plaintiff; and that plaintiff, in ignorance of the danger, while drilling and preparing for a blast, was injured by the explosion of one of the concealed blasts."

It is further stated, in effect, that the shift boss, Thomas Cadden, testified that July 1, 1894, he loaded six holes in the forehead of a certain drift with dynamite, and endeavored to explode the same by electricity; that there were three holes that had wires sticking out of them after the blast had been fired; that no further work was done at that place in the mine until July 17, 1894, at which time the shift boss placed the plaintiff and one Hugh Cadden at work at the forehead in question. McMahon himself testified that he commenced work in the mine June 19, 1894; that he first worked back toward the shaft from the forehead, the further ⁴⁵² end of the diggings—from the west to the east, between the shaft and the forehead; that he worked at that place near the shaft about two weeks; that after that they moved down about one hundred feet away, and worked there probably a week, and July 17th they started to work up in the forehead—right at the forehead; that there had not been anybody working in that forehead just before for a while—not for a couple of weeks, he should judge. That was the place where the explosion occurred which injured McMahon. It is very obvious that McMahon was not at work at that place July 1st, when the par-

tial explosion took place, nor at any time until he was put at work there by the shift boss, July 17, 1894; and consequently he was put in a new place to work, which the shift boss knew to be dangerous, but of which he was ignorant. The admitted facts in the case at bar are very different.

We must hold that the plaintiff in this case was a fellow-servant with the foreman, and hence that the defendant is not responsible for the negligence of Pender. Besides, the plaintiff and Pender had worked together in the quarry for fourteen years in the same kind of service, and having the same relation to each other, and hence we must hold that the plaintiff assumed the risk. This view is supported by the authorities cited: See, also, *Paule v. Florence Min. Co.*, 80 Wis. 350, 50 N. W. 189; *Showalter v. Fairbanks etc. Co.*, 88 Wis. 381, 60 N. W. 257; *Dougherty v. West Superior etc. Co.*, 88 Wis. 343, 60 N. W. 274; *Mielke v. Chicago etc. R. R. Co.*, 103 Wis. 1, 74 Am. St. Rep. 834, 79 N. W. 22.

By the Court. The judgment of the circuit court is affirmed.

Fellow-servants.—Persons in the employ of the same master, engaged in the same common work, and performing services for the same general purpose, are fellow-servants. They need not be engaged in the same particular work: *Spees v. Boggs*, 198 Pa. St. 112, 82 Am. St. Rep. 792, 47 Atl. 875. The character of the act, and not the rank of the person performing it, furnishes the test by which to determine whether the person acting is the representative of the master or a fellow-servant: *Morgridge v. Providence Tel. Co.*, 20 R. I. 386, 78 Am. St. Rep. 879, 39 Atl. 328; monographic note to *Mast v. Kern*, 75 Am. St. Rep. 587-589. A foreman of a stone quarry, whose duty it is to warn servants working in one tunnel to leave their work before a blast in an adjoining tunnel is fired, is a fellow-servant of one who is injured by reason of his failure to give such warning: *Donovan v. Ferris*, 128 Cal. 48, 79 Am. St. Rep. 25, 60 Pac. 519. Compare the monographic note to *Mast v. Kern*, 75 Am. St. Rep. 618. The subject of fellow-servants in general is discussed in the monographic notes to *Fox v. Sandford*, 67 Am. Dec. 588-597; *Fisk v. Central Pac. R. R. Co.*, 1 Am. St. Rep. 32, 33.

SULLIVAN v. SHERRY.

[111 Wis. 476, 87 N. W. 471.]

A TENANT IN COMMON MAY MAINTAIN TROVER AGAINST HIS COTENANT AND THE LATTER'S LICENSEE for cutting and removing timber from the lands of the cotenancy and converting it to his exclusive use. (p. 890.)

TENANTS IN COMMON, NONJOINDER OF.—Where timber has been cut and removed from lands of a cotenancy and converted to his sole use by a licensee of one of the cotenants, the cotenant thus granting the license need not be made a party to an action by the other cotenant to recover for the conversion. (p. 891.)

Action for wrongfully cutting, removing, and converting timber from lands of which Thomas Jennings and the Ingersoll Land and Lumber Company were tenants in common. The company had granted defendant a license to cut and remove such timber, in which the cotenant did not join; on the contrary, he assigned his cause of action to the plaintiff. The trial court sustained a demurrer to the plaintiff's complaint on the ground that it did not state facts sufficient to constitute a cause of action, and that the complainant should have been joined as a party. Plaintiff appealed.

Wheeler & Van Doren, for the appellant.

Nathaniel S. Robinson, for the respondents.

478 MARSHALL, J. The general rule is that one tenant in common cannot maintain trespass or trover against his cotenant or the latter's licensee of the joint property in respect thereto. The trial court, supposing that such rule was controlling in this case, sustained the demurrer. It is not infrequent that courts are misled into giving a general the effect of a universal rule. There are but few of the former that are not subject to exceptions as well established and important as the general principle; and the rule in question does not belong to that few. It is subject to several exceptions, one being that if a cotenant or his licensee destroys the common property or converts it to his own use, he may be sued in trespass or trover to redress the wrong wherever such a remedy would exist in the absence of the relationship between cotenants. This court recognized and applied that doctrine at a very early date: *Warren v. Aller*, 1 Pinn. 479, 44 Am. Dec. 406. It was there said to be well settled by modern decisions in such cases that the

action of trover or trespass in favor of the injured party will lie. For further instances where this court has sustained such actions, see *Bulger v. Woods*, 3 Pinn. 460, 60 Am. Dec. 393; *Earll v. Stumpf*, 56 Wis. 50, 13 N. W. 701; *Tipping v. Robbins*, 64 Wis. 546, 25 N. W. 713, 71 Wis. 507, 37 N. W. 427. The authorities clearly indicate that the exception we have stated to the general rule is not a modern creation. It has been recognized by courts and law-writers at least from the time of the Year Books: *Coke on Littleton*, 200a, 200b; 2 *Crabb on Real Property*, sec. 2318b; 2 *Waterman on Trespass*, sec. 947; 17 *Am. & Eng. Ency. of Law*, 2d ed., 700; *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553; *Clow v. Plummer*, 85 Mich. 550, 48 N. W. 795; *Omaha etc. R. Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185, 21 Pac. 925; *Critchfield v. Humbert*, 39 Pa. St. 427, 80 Am. Dec. 533; *Murray v. Haverty*, 70 Ill. 318. In *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553, the facts were that one tenant in common of a mill, without consent of his cotenant, removed and appropriated to his exclusive use the mill machinery. The injured cotenant brought trespass quare clausum. The general rule was invoked that one tenant ⁴⁷⁹ cannot maintain such an action, because in contemplation of law each such tenant is rightfully possessed of every part of the common property, and if one suffers injury by his cotenant obtaining the greater portion of the benefits from such property, his remedy is by action for accounting. The court held that appropriation of the income, or mere use, of property was one thing, and appropriation of the corpus thereof another; that the former was a wrong remediable in an action for accounting; but the latter was a wrong sounding in tort, remediable by trespass or trover. The other authorities cited, and many more that might be cited, are to the same effect.

It is clear that the taking of the timber by defendants by permission of the cotenant of Jennings, and appropriation thereof to their exclusive use, indicated a clear determination to hold the same or the proceeds thereof as their sole property, and was such an ouster of Jennings and wrongful conversion of his property as brought them within the exception to the general rule as to remedies between cotenants, rendering them liable in trespass or trover. It also follows, necessarily, that the rule that cotenants must join as plaintiffs in an action for injury to the common property does not apply. Jennings' cotenant was a wrongdoer as well as de-

endants. All could have been joined or either have been sued separately. The interests of the cotenants were hostile to each other. The general rule for the joinder of cotenants is based on the theory that their interests are in harmony and that each is interested in the recovery. There was no defect of parties plaintiff and no insufficiency in the complaint to state a cause of action.

The order appealed from must be reversed, and the cause remanded with directions to the circuit court to enter an order overruling the demurrer.

By the Court. So ordered.

A Cotenant Who Contracts to Sell Timber belonging to the cotenancy, and directs the purchaser to the place where it is and as to the steps to be taken for its removal, and who receives the purchase price therefor, is guilty of its conversion: *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238, 40 Atl. 138. See, in this connection, the recent case of *Leader v. Plante*, 95 Me. 343, 85 Am. St. Rep. 418, 50 Atl. 53; and the monographic note to *Bolling v. Kirby*, 24 Am. St. Rep. 817, 818.

STERN v. RICHES.

[111 Wis. 591, 87 N. W. 555.]

PRACTICE—SPLITTING CAUSES OF ACTION.—WHERE SEVERAL ARTICLES OF PERSONAL PROPERTY ARE WRONGFULLY TAKEN FROM THE OWNER BY A SINGLE ACT, but one cause of action accrues to him, and he must pursue his remedy in a single action. A recovery for any of such articles precludes any recovery for the remainder. (p. 893.)

PRACTICE.—A SINGLE ACTION ONLY CAN BE MAINTAINED for the levy of an attachment upon property exempt from execution and the refusal to surrender it to the defendant, though some of the articles were of such a character that it was the duty of the officer to deliver them on demand, and as to others, he had a right to retain them in his possession for a reasonable length of time to enable him to make an inventory and appraisal, and the defendant to select, claim, and receive in return his exempt portion. (pp. 896, 897.)

TRESPASSER AB INITIO.—An officer levying a writ of attachment, though he has a right to retain the property for a reasonable length of time to make an inventory and appraisal and to permit the defendant to claim his exemption, becomes a trespasser ab initio in unreasonably depriving him of the opportunity to make a selection of his exempt property or refusing to recognize his right to property clearly exempt. (p. 896.)

Replevin, to which the defendant pleaded a former recovery. In December, 1900, the plaintiff was the owner and in possession of the horse and other personal property sought to be recovered in this action, and also of a stock of merchandise and fixtures located in a grocery store. The defendant, as constable, then levied upon and took all the property into his possession under a writ of attachment against the plaintiff. She requested him to cause an inventory and appraisement to be made of the store, goods, and fixtures, for the purpose of enabling her to select her exemptions. The defendant caused such inventory and appraisement to be made, and the plaintiff exercised her right of selection, presented a list of the articles selected, and demanded possession of them. This demand was refused. She then, on January 2, 1901, commenced an action of replevin for the property thus demanded. One day later she brought the present action to recover the horse and other property. In the first action plaintiff recovered judgment. After its recovery it was pleaded as a bar to the prosecution of the present action. Judgment in favor of the defendant and the plaintiff appealed.

Victor Linley and C. H. Crownhart, for the appellant.

A. T. Rock and Ross, Dwyer & Hile, for the respondent.

⁵⁹³ MARSHALL, J. There can be but one action to redress a single wrong. The law does not permit a person to indulge in useless and vexatious litigation by splitting up a cause of action and prosecuting several suits of the same or different natures. No principle is better settled than that. The ⁵⁹⁴ learned trial court decided that the levy upon the property sought to be recovered in this action, and that upon the property involved in the first action of replevin, were a single act and an inseparable wrong, giving rise to but one cause of action; and that the commencement of the first action precluded maintenance of the second.

Appellant does not contend but that the general rule is that, where one wrongfully deprives another of several articles of personal property by a single act, but one cause of action thereby accrues to such other; and that, while he may have an election of remedies, when he makes his election he must pursue his remedy by a single action. That is the settled law, as may be seen by reference to the following: *Farrington v.*

Payne, 15 Johns. 432; *Herriter v. Porter*, 23 Cal. 385; *Draper v. Stouvenel*, 38 N. Y. 219; *Marble v. Keyes*, 9 Gray, 221; *Barnard v. Devine*, 34 Misc. Rep. 182, 68 N. Y. Supp. 859; *Reilly v. Sicilian A. P. Co.*, 31 App. Div. 302, 52 N. Y. Supp. 817; *Funk v. Funk*, 35 Mo. App. 246; *Bennett v. Hood*, 1 Allen, 47, 79 Am. Dec. 705; *Trask v. Hartford etc. R. R. Co.*, 2 Allen, 331; *McCaffrey v. Carter*, 125 Mass. 330; *Sullivan v. Baxter*, 150 Mass. 261, 22 N. E. 895; *Folsom v. Clemence*, 119 Mass. 473. The rule has been strictly enforced by courts as the following clearly indicates. In *Folsom v. Clemence*, 119 Mass. 473, the plaintiff inadvertently omitted several articles of property in bringing his first action. Nevertheless, the court held that the judgment in such action was a bar to the prosecution of an action to recover such omitted articles. In *Sullivan v. Baxter*, 150 Mass. 261, 22 N. E. 895, there was the same ruling. In *McCaffrey v. Carter*, 125 Mass. 330, it was held that even where part of the articles wrongfully withheld from plaintiff by the defendant were omitted from the first action through the fraud of the latter, a second action could not be maintained. That is an extreme application of the rule—one that could not be followed without hesitation and careful consideration. Many cases hold that the judgment in the first action is a bar to a second action only so far as the plaintiff knew or ⁵⁹⁵ ought to have known of the facts in time to have included the omitted articles in such first action: *Moran v. Plankinton*, 64 Mo. 337; *Farrington v. Payne*, 15 Johns. 432. *Marble v. Keyes*, 9 Gray, 221, was in many respects like this case. An officer, under a writ of attachment, levied upon a stock of goods and upon a harness and wagon which were located in a barn a quarter of a mile from the store where the goods were situated. An action was commenced which proceeded to judgment for the store goods and that was held to be a bar to an action to recover the harness and wagon.

Applying the foregoing to the facts of this case, there can be no doubt that the claim of appellant to all the property taken by respondent under the writ of attachment was single and enforceable in one action, unless it was separable because the wrong, as to the store goods, was not complete till respondent refused to deliver the same after the appraisement of the stock, the designation by appellant of the articles claimed by her, and the refusal to comply with her demand for possession thereof. While she testified that the property

involved in this action was located some distance from the store, and that she did not know it was taken by the officer till some days after she received knowledge that the other property had been taken, she knew all the facts when the first action was commenced, and so cannot defend her failure to include all the property therein by the plea of ignorance, if we were to hold that want of knowledge of the facts would constitute an excuse for such failure, as held in some of the cases cited.

The right of plaintiff to her horse and the property other than the store goods and fixtures did not depend upon any act upon her part in selecting the same out of a quantity of property of the same character. She had no other property of the same nature. It was exempt by plain provisions of the statutes, hence respondent committed an actionable wrong in respect thereto as soon as he deprived appellant ⁵⁹⁸ thereof: *Gilman v. Williams*, 7 Wis. 329, 76 Am. Dec. 219; *Cole v. Green*, 21 Ill. 104; *Savage v. Davis*, 134 Mass. 401. But the law in respect to the exemption of property from attachment, of the character of that involved in the first action (Stats. 1898, subd. 8, sec. 2982), clearly contemplates that an officer holding a writ of attachment may levy upon an entire stock of goods belonging to the defendant, subject to his exemptions, and retain possession thereof for a reasonable length of time to enable such officer to make an inventory and appraisal thereof, and to permit the defendant to select and claim and receive a return of the exempt property; and that, if the exemption right is not asserted within a reasonable time, it will be deemed waived. Section 2982a of the Statutes of 1898 provides that: "Whenever personal property shall be seized on attachment or execution, and any part thereof shall be exempt from such seizure under any provision of law exempting to the debtor property of like kind to a specific amount in value, and such exemption shall be claimed on the part of the debtor or his wife, the officer making such seizure shall, upon request by either of them, or may upon his own motion, cause said exempt property to be appraised, . . . for the purpose of such exemption." Under similar statutes elsewhere it has been held that the officer, by merely levying upon property, does not become a trespasser; that he has a right to take such possession thereof as is necessary to enable him to make an inventory and appraisal of the same: *Bonnel v. Dunn*, 29 N. J. L. 435; *Town*

v. Elmore, 38 Mich. 305; Vanderhost v. Bacon, 38 Mich. 669, 31 Am. Rep. 328.

Our statute, as held in the last case cited, clearly makes it the duty of the officer to inventory the property at the place where it is levied upon, if seasonably demanded by the defendant and makes such inventory and the required appraisement of the property, and subsequent recognition of the rights of the defendant to the articles selected as exempt, essential to the validity of the levy. If the officer ⁵⁹⁷ unreasonably deprives the defendant of an opportunity to make a selection of his exempt property, or refuses to recognize the right to the exempt property upon the particular articles claimed being designated and demanded, he is guilty of such an abuse of process as to render him a trespasser ab initio. He has no right to take the exempt property at all, except subject to the right of exemption, and if he disregards such right by refusing to make the inventory and appraisal required by statute when requested by the defendant, or refusing to set aside and deliver to the defendant, upon demand therefor, the articles selected as exempt, evincing that the levy was not made subject to, but in defiance of, the exemption right, he is guilty of an abuse of process and is a trespasser ab initio. Section 2982 of the Statutes of 1898 provides, as to property exempt under subdivision 8 as well as under every other subdivision of the section, that it is not liable to seizure on attachment or execution. Looking at that with section 2982a, it is evident that a seizure of property under subdivision 8 is not a completed wrong till the invasion of the owner's right of exemption is complete, and that then the wrong dates from the first interference with the property. Our statute was taken from Michigan with the construction above indicated. It differs from the Michigan statute in that it does not require the officer making an attachment upon property, under circumstances such as existed in this case, to cause an inventory and appraisement thereof to be made and to give to the defendant the full benefit of the exemption right whether he demands it or not. But the two statutes seem identical as to requiring that the defendant shall have reasonable opportunity to exercise the exemption right; that when exercised it shall be respected; and that a levy in defiance of such right is illegal.

From what has been said we reach the conclusion that the conduct of respondent prior to the commencement of the

first action of replevin rendered him a wrongdoer as to ⁵⁹⁸ the property involved in that action from the time of the taking thereof, and that the same wrong included taking the property involved in this action. That is in accordance with the decision of the trial court and requires an affirmance of the judgment appealed from.

By the Court. The judgment appealed from is affirmed.

A Single Cause of Action cannot be Split up into several suits: King v. Chicago etc. Ry. Co., 80 Minn. 83, 81 Am. St. Rep. 238, 82 N. W. 1113. Thus, an action for wrongful attachment cannot be maintained by one who interpleaded in the attachment suit, setting up a claim to and recovering a part of the goods, but not that for which damages are sought: Wheeler Sav. Bank v. Tracey, 141 Mo. 252, 64 Am. St. Rep. 505, 42 S. W. 946. And a judgment in replevin against one of two joint takers for a portion of the chattels taken, and nominal damages under which all the property is recovered, is a bar to a subsequent action against both takers for further damages: Bennett v. Hood, 1 Allen, 47, 79 Am. Dec. 705.

Wrongful Attachment.—Actions for wrongful attachments and defenses thereto are discussed in the monographic note to Burton v. Knapp, 81 Am. Dec. 467-480. Damages for wrongful attachment are discussed in the monographic note to Tisdale v. Major, 68 Am. St. Rep. 266-280. An officer who attaches goods exempt by law from attachment is a trespasser: Kiff v. Old Colony etc. Ry. Co., 117 Mass. 591, 19 Am. Rep. 429. See, also, Nix v. Goodhill, 95 Iowa, 282, 58 Am. St. Rep. 434, 63 N. W. 701. The right to exemption from execution is not waived by the debtor failing to claim it and receipting to the officer for the goods: Vanderhorst v. Bacon, 38 Mich. 669, 31 Am. Rep. 328. See, also, Wilson v. Stripe, 4 G. Greene, 551, 61 Am. Dec. 138.

LUBY v. BENNETT.

[111 Wis. 613, 87 N. W. 804.]

A RIGHT OF ACTION FOR MALICIOUS PROSECUTION does not accrue until the wrongful proceeding has been brought to a final determination in favor of the defendant or person accused. It is not, however, necessary that all proceedings required in the action to finally enforce the rights of the parties end before such right of action accrues, but only that the issues material to the question of the bona fides of the action shall have been tried and closed by a final judgment. (p. 899.)

MALICIOUS PROSECUTION.—THE CONTINUANCE OF THE RIGHT OF APPEAL IN THE ORIGINAL ACTION does not prevent judgment therein in favor of the defendant from being such a final determination of the action as is necessary to support an action for malicious prosecution. (p. 900.)

MALICIOUS PROSECUTION—APPEAL IN FORMER ACTION, WHETHER PLAINTIFF MUST NEGATIVE.—In an action for malicious prosecution it is not necessary for the plaintiff to allege that no appeal has been taken in the former action, or that the right to take it has terminated. If such taking or right exists, it is incumbent on the defendant in the action for malicious prosecution to plead it in his answer if he wishes to rely upon it as a defense. (p. 900.)

FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION no action can be sustained by the defendant, according to the English decisions, where neither his personal liberty nor his property is interfered with. (p. 901.)

AN ACTION CAN BE SUSTAINED FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION brought ostensibly for the purpose of winding up a partnership, and the purpose and effect of which were to take possession of the property from the defendant for the benefit of the plaintiff and to enable him, through the forms of law, to control such property, and thereby obtain title thereto. (pp. 906, 907.)

PLEADING—DAMAGES, AMOUNT OF, WHEN NEED NOT BE ALLEGED.—In an action for the malicious prosecution of a civil action the complaint is not insufficient because it fails to declare that the plaintiff was damaged in some specified amount if damages to him are necessarily inferable from the facts stated. (p. 908.)

Action to recover damages for the malicious prosecution of a civil action. The complaint alleged that plaintiff and defendant were partners from the 27th of March to the 6th of November, 1897, in the shoe business in Janesville, Wisconsin; that the plaintiff contributed to the business four thousand four hundred dollars and gave his personal attention thereto, which was reasonably worth one hundred dollars per month; that the sales amounted to seventeen thousand dollars, from which a profit of thirty per cent accrued, one-half of which belonged to the plaintiff; that defendant, on the date last named, maliciously and without probable cause commenced an action against the plaintiff, charging him with wrongfully taking from the assets of the firm goods and money worth two thousand dollars and upward, and appropriated them to his own use, and with selling goods on credit without making any account, intending to collect therefor, and of converting the proceeds to his own use. Without notice to the plaintiff, defendant procured the appointment of himself as receiver, and thereupon took exclusive control of the firm property, and subsequently sold it at a great sacrifice, secretly bidding in for his own benefit, and that plaintiff's interest in the firm was thereby wholly lost, and that the purpose of the action was to accomplish this result. The plaintiff alleged that he

was caused to expend fifteen hundred dollars in defending himself against this unjust action, that he was injured in his good name, was caused much mental pain, and was seriously prejudiced in his efforts to obtain profitable employment. A demurrer to the complaint interposed by the defendant was overruled and he appealed.

Sutherland & Nolan, for the appellant.

Winans & Russell, for the respondent.

616 MARSHALL, J. A right of action for damages for malicious prosecution does not accrue till the wrongful proceeding has been brought to final determination in favor of the defendant or person accused: *Pratt v. Page*, 18 Wis. 337; *Winn v. Peckham*, 42 Wis. 493, 499; *Woodworth v. Mills*, 61 Wis. 44, 50 Am. Rep. 135, 20 N. W. 728; *Lawrence v. Cleary*, 88 Wis. 473, 60 N. W. 793; *Lowe v. Wartman*, 47 N. J. L. 413, 1 Atl. 489; *Commonwealth v. McClusky*, 151 Mass. 488, 29 N. E. 72. Hence, as indicated in the authorities cited, in an action to recover compensation for such a wrong, such final determination must be distinctly alleged in the complaint and proved upon the trial, the same as any other fact essential to the cause of action, or the pleading will be open to successful challenge for insufficiency. Appellant now invokes that rule, but as we read the complaint it seems that it is very clearly alleged that the wrongful prosecution was ended by a judgment in favor of the defendant therein before this action was commenced. The meaning of the language of the pleading—"it was finally decided and adjudged in said action on the twenty-fifth day of September, 1900, that said action was without foundation and was maliciously and unjustly begun, and that this plaintiff was and had not **617** been guilty of any wrong, and awarded this plaintiff judgment therein against the plaintiff therein (the defendant in this action)"—leaves no room for reasonable controversy, but that the alleged wrongful prosecution was closed by a judgment in favor of respondent prior to the commencement of this suit. It is said that the receiver appointed had not made his report when this action was commenced, and that it indicates that the alleged wrongful prosecution was not ended. The rule invoked does not require that all proceedings that may be had or are required in an action to finally work out or enforce the rights of the parties shall occur before a cause of action will

accrue to the defendant therein to prosecute the plaintiff for maliciously commencing and carrying on such action. It requires only that the issues material to the question of the bona fides of such action shall be tried and closed by final judgment. That was done in the case in question, notwithstanding the provisional remedy or ancillary proceeding therein, to control, administer, and preserve the property involved, to await the final determination of the rights of the parties, was not fully closed up.

It is suggested that the action cannot be said to have been finally closed when this action was commenced, because the right of appeal from the judgment to this court existed. There is authority to the effect that a judgment in favor of the defendant in the alleged wrongful action, appealed from to a higher court, does not satisfy the element of want of probable cause, and is insufficient to sustain a suit for malicious prosecution of such action: *Reynolds v. De Geer*, 13 Ill. App. 113; *Nebenzahl v. Townsend*, 61 How. Pr. 353. In the first of such cases the decision went upon the ground that the alleged wrongful prosecution was in a justice's court, and that the appeal from the judgment opened up the whole matter, giving the plaintiff therein a right to a trial *de novo*; and in neither case was the question under discussion raised by an objection to the sufficiency of the complaint,⁶¹⁸ but the status of the alleged wrongful prosecution was treated as matter of defense. *Nebenzahl v. Townsend*, 61 How. Pr. 353, is supported by numerous citations from English authorities to the effect that the plea of a pending appeal from the judgment in the first action is a good defense. In *Ingram v. Root*, 51 Hun, 238, 3 N. Y. Supp. 858, it is said that it is essential to allege in the complaint that the judgment in plaintiff's favor in the first action has not been appealed from or that it has been appealed from and affirmed. No authority is cited to support that view, and none which we may safely follow exists. The decision is out of harmony with all others in the New York courts, and contrary to the settled law as declared by its highest court, as is clearly evidenced by *Marks v. Townsend*, 97 N. Y. 590, where it was held that a final judgment, in an action alleged to have been maliciously brought, satisfies the essential element of a final determination of the wrongful prosecution in an action to recover damages for such a wrong, notwithstanding the right of appeal therefrom exists; and that, if an appeal has been

taken from the judgment and is actually pending, the judgment, till set aside or reversed, will stand for want of probable cause as much as any judgment can; that a pending appeal is effectual only to sustain an application for an order staying proceedings till the appeal shall have been determined. It is not necessary here to go that far. It is sufficient to hold that, on the question of the status of the alleged wrongful prosecution, it is sufficient to allege, in the action for damages on account of it, that judgment was rendered in favor of the defendant therein; and that if the defendant in the action for damages desires to defeat the plaintiff on that question, he must lay the foundation therefor by answer instead of by relying on an objection to the complaint by a demurrer for insufficiency (*Carter v. Paige*, 80 Cal. 390, 22 Pac. 188); that, while the pendency of an appeal may constitute a defense, in the absence of anything to show that there is a pending ⁶¹⁹ appeal from the judgment the presumptions are in favor of the validity and justice thereof; that no allegation on that subject is necessary on the part of the person relying thereon; and that the mere right of appeal from a judgment in an alleged malicious prosecution does not affect the right of the defendant therein, if he is the prevailing party, to pursue his prosecutor in an action for damages.

The further claim is made that the complaint is insufficient because it shows that in the alleged wrongful prosecution the defendant was brought into court by the mere service of a summons, neither his personal liberty nor his property being interfered with. If the nature of the suit were such as appellant's counsel claim, there would be much authority to sustain their position. The rule in England, when this country was within its jurisdiction, was and still is, that since costs are allowed to the successful defendant in a civil suit, they are presumed to compensate him for all damages suffered, if neither his person nor property is interfered with, regardless of whether the prosecution is maliciously wrongful or not. Ordinarily, we would say that such rule should be regarded as part of the common law and binding upon courts here till changed by statute, the same as any other common-law principle. But it does not seem to have been so regarded to any great degree. Courts have treated the subject of whether the right to compensation for malicious prosecution of a mere civil case, without interference

with person or property, exists, as matter of judicial policy, to be determined according to varying opinions of judges of supreme judicial tribunals, though the decisions in regard thereto, found in the books, are not based on that ground to any great degree, but on what was supposed to be the weight of authority. The result is that on an important branch of the law that has been settled in England since costs were allowed to the successful defendant by the statute of Marlbridge (52 Henry III, 1267), the ⁶²⁰ courts of the states of this Union, and the text-writers as well, are in as much confusion as in respect to any other branch of the law that could be suggested.

What we say as to the law of England is supported by the following quotation from the opinion of Lord Bowen in *Quartz Hill etc. Min. Co. v. Eyre*, L. R. 11 Q. B. D. 674, 690: "The broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. . . . The counsel for the plaintiff company have argued this case with great ability; but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause."

To support what we have said as to the confusion of authority in this country, we refer to the following: In 3 *Lawson on Rights, Remedies, and Practice*, section 1082, we are informed that "most of the earlier cases in the United States, and a few of the recent ones, follow the English rule; but others, and it would seem on better grounds, sustain the action," where neither person nor property is interfered with in the alleged wrongful action. The note to the text indicates that the authorities in favor of the English rule are much more numerous and are as recent as those to the contrary, and that the latter are based almost wholly on *Pangburn v. Bull*, 1 Wend. 345, *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330, and *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316. An examination of those cases indicates that the rule, at its inception in this country, was founded in error.

The first invasion of the common-law rule seems to have

been made in *Pangburn v. Bull*, 1 Wend. 345, in 1828; the next in *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330, in 1836. In the first case it seems that the ⁶²¹ change in the ancient English rule, founded on the statute of Marlbridge, was overlooked. All the supporting American authorities cited by the court were cases of arrest and bail. In the Connecticut case the change in the English rule was recognized, but the court declined to follow it, preferring, for reasons stated, to follow the doctrine established prior to the statutory right of successful defendants to costs. The Vermont court followed Connecticut and adopted its reasoning. The cases referred to were followed in *Eastin v. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. 1106, though it was said that the weight of authority, American as well as English, and the text-writers, is the other way. In *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558, it seemed to the court that the weight of American authority was against the English rule. In 14 American and English Encyclopedia of Law, 34, it is said the authorities on the question are evenly balanced. The author, for support, refers to an article by Mr. John D. Lawson, published in 1882: 21 Am. Law Reg. 281, 353. Other writers, including some judges, have cited Mr. Lawson's article as if it accorded with the idea that the English rule is condemned by the weight of authority in this country. A careful reading of such article shows that the writer's conclusion was to the contrary, and that courts and text-writers who have referred to it to support the departure from the English rule have adopted the author's idea as to what is the better rule instead of the one that has the greater support in American decisions. Here is his conclusion: "We have now reviewed all the American cases pro and con, and the weight of authority appears to be against the right of action for the unfounded and malicious prosecution of an ordinary civil action. With the majority are all but one of the text-writers we have cited—Swift, Townsend, Addison, and the authors of the American leading cases, who follow the English adjudications; Mr. Weeks, who limits the right to 'exceedingly vexatious suits where special damage has been actually suffered'; and Judge Cooley, who ⁶²² discourages the remedy without positively denying the right. On the other side is Mr. Hilliard, who evidently favors the action, but unfortunately relies upon cases which do not sustain it at all. Of the thirteen cases we have just

examined, three hold that the action is not sustainable because it is not, three that it will not lie because the defendant has his costs, which, in England, is considered a sufficient remedy. . . . In but five cases (*Pangburn v. Bull*, 1 Wend. 345, in New York; *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330, in Connecticut; *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316, in Vermont; *Marbourg v. Smith*, 11 Kan. 554; *Woods v. Finnell*, 13 Bush, 629), do the courts recognize that there is a wrong for which there should be a remedy. But while the weight of authority denies the action, the weight of reason allows it. We have set out at length the arguments of the courts pro and con, and no one can read them without being struck with the weakness of the position assumed by the majority of the American courts that have been called upon to deal with this question, and of the writers who have stated the law as they understood the decisions": 21 Am. Law Reg. 368, 369.

In *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 67 Am. St. Rep. 242, 51 N. E. 569, the court said that the great weight of American authority and the better reasoning are in accord with the English rule; that it was preferable to follow what Mr. Lawson said as to which way the greater weight of authority points, since the court's examination of judicial and elementary authority on the subject confirmed him, than to follow his judgment as to what the law ought to be. In *Stephen on Malicious Prosecution*, American edition, 21, it is said in the note that the rule is well settled in the United States contrary to the rule of the English courts. How valueless the writer's work is to a correct understanding of the subject is seen from the fact that *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330, *Pangburn v. Bull*, 1 Wend. 345, *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316, and other cases following their lead are cited as holding the same as *Eberly v. Rupp*, 90 Pa. St. 259, *Muldoon v. Rickey*, 103 Pa. St. 111, 49 Am. Rep. 117, *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870, and other cases which in fact distinctly follow the English rule. The writer of the note says, apparently intending to use language in accord ⁶²³ with the opinion of Beck, J.: "And in such cases the plaintiff is entitled to recover the damages sustained by him"; while in fact Justice Beck used this language: "We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution

of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of defendant and no special injury sustained which would not necessarily result in all suits prosecuted to recover for like causes of action."

So careful a writer as Judge Cooley does not venture to say definitely which way the weight of authority preponderates in this country, though his language leads one to believe that, in his judgment, it is in favor of the English rule. He confines the civil actions that may support one for damages for malicious prosecution by the settled law to maliciously instituting and prosecuting proceedings in bankruptcy, suits in which the defendant is arrested, suits in which the property of the defendant is attached, and proceedings to have a party declared insane and placed under guardianship. He says, as to other civil actions: "In some cases it has been held that an action may be maintained for the malicious institution without probable cause of any civil suit which has terminated in favor of the defendant; but the English authorities do not justify this statement, and there is much good reason in what has been said in a Pennsylvania case (*Mayer v. Walter*, 64 Pa. St. 283), that 'if the person be not arrested or his property seized, it is unimportant how futile and unfounded the action might be; as the plaintiff, in consideration of law, is punished by the payment of costs.' If every suit may be retried on an allegation of malice, the evils would be intolerable and the malice in each subsequent suit would be likely to be greater than in the first": Cooley on Torts, 2d ed., 219.

The first significant case found in the American decisions is *Ray v. Law*, Pet. C. C. 207, Fed. Cas. No. 11,592 decided in 1816, where the English rule was followed to the letter, it being said that: "If bail be not demanded, it is unimportant how futile and ⁶²⁴ unfounded the action may be, as the plaintiff is punished by the payment of costs and the defendant is not materially injured." The following authorities, in addition to those already referred to, support Judge Cooley's observation: *McNamee v. Minke*, 49 Md. 122; *Supreme Lodge A. P. L. v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Bitz v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233; *Potts v. Imlay*, 4 N. J. L. 330, 7 Am. Dec. 603; *Woodmansie v. Logan*, 2 N. J. L. 93; *Mitchell v. Southwestern R. R. Co.*, 75 Ga. 398; *Kramer v. Stock*, 10 Watts, 115; *Gorton v. Brown*,

27 Ill. 489, 81 Am. Dec. 245; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Cade v. Yocum*, 8 La. Ann. 477; *Thomas v. Rouse*, 2 Brev. 75. The doctrine of those cases and the mischief it is aimed at are well indicated by the following language from the opinion in *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878:

"We may as well say that the law seems to be settled by the weight of authority, although there are some decisions to the contrary, that an action will not lie for malicious prosecution in a civil suit, unless there was an arrest of the person or seizure of property, as in attachment proceedings at law or their equivalent in equity, or in the proceedings in bankruptcy, or like cases, where there was some special damage resulting from the action, and which would not necessarily result in all cases of the like kind."

"The policy of the law, while encouraging arbitrations and settlements without suit, has ever been to afford fair opportunity to all to have their claims determined in the courts. To hold it now to be that in every case of failure by the plaintiff to establish his allegation of fraud, there being no special damage resulting therefrom, upon a suggestion of malice and want of probable cause an action for malicious prosecution would lie against him, would open the floodgate to a species of litigation hitherto unknown in North Carolina, the absence of which, up to the present time, indicates that it has not heretofore been recognized."

The Iowa court, in *Wetmore v. Mellinger*, 64 Iowa, 741, 52 Am. Rep. 465, 18 N. W. 870, mentioned, as considerations for the doctrine that the malicious prosecution of a mere civil suit, without interference with the person or property of the defendant, will not sustain an action for damages, the following: ⁶²⁵ "The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. . . . If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice?"

From what has been said it will be seen that the proposition submitted and contended for by appellant's counsel ought not to receive approval as the law of this state without the

most careful consideration of the subject in a case necessarily depending upon a correct solution of it. As at present advised, we are not prepared to say that such a case has been heretofore decided by this court. Noonan v. Orton, 30 Wis. 356, was not such a case. There the plaintiff's property was seriously interfered with by successive, unnecessary, and vexatious equitable levies thereon in garnishee proceedings, and the ground of the action was abuse of the process of the court. In our judgment the present case does not necessarily turn on the broad proposition contended for. The alleged wrongful action was not an ordinary suit, where neither person nor property was interfered with, and where there was no damage other than such as generally results from ordinary civil actions in such circumstances. The action was brought ostensibly for the purpose of winding up a partnership. Before it was commenced, respondent was in possession of the partnership property as much as appellant. The purpose of the action was to as effectually deprive him of that possession and subject it, in invitum, to the claim of appellant, as if it were levied upon by writ of attachment. Under such circumstances damages other than taxable costs necessarily follow. Moreover, special damages are expressly alleged in the complaint. The pleader says, in effect, that the purpose of the plaintiff was, by means of the winding-up proceedings, to obtain possession of the partnership property, ⁶²⁶ in form as an officer of the court for the benefit of the person legally entitled thereto, but in fact for the benefit of the plaintiff; and, through the forms of law, to administer the property ostensibly for the legitimate purpose of a winding-up suit, but in fact to enable the plaintiff to control the property, and, in an indirect way, to obtain the full title thereto; and that such purpose was fully consummated, whereby respondent's interest in the firm assets was wholly lost to him. The same reasoning that supports an action for damages for maliciously and without probable cause instituting and prosecuting proceedings to have a person declared a bankrupt applies to an action maliciously brought to wind up a partnership, founded on alleged misconduct of the defendant.

In quite a recent English case to which we have already referred (*Quartz Hill etc. Min. Co. v. Eyre*, L. R. 11 Q. B. D. 674), wherein the rule that an ordinary civil action, neither the property nor the person of the defendant being interfered with, causing special damage, though maliciously

brought and prosecuted, will not sustain an action for damages, was maintained with as much clearness and firmness as in any previous case, it was held that an action maliciously brought and prosecuted to wind up a partnership should not be classed with those where the damages to the defendant are deemed to be *damnum absque injuria*, but under the third head of actionable wrongs growing out of malicious prosecutions, laid down by Holt, C. J., in *Savill v. Roberts*, 1 *Ld. Raym.* 374, 378—namely, actions where a man's fair fame and credit are injured. It was said that such an action is not like an ordinary action for fraud, where the wrong done by merely bringing the action is supposed to be remedied by the vindication of the defendant at the trial; but its effect is like that in wrongful proceedings in bankruptcy—the good name, fame, and credit of the person accused is necessarily seriously injured. That seems plain, and it is equally plain that such actions fall within ⁶²⁷ the class held to constitute a good foundation for an action for damages for malicious prosecution on account of the interference with property rights. Any particular method of interfering with property rights, as by writ of attachment, is not material. An equitable levy upon property, as in garnishee proceedings, or the deprivation of the defendant of his property by means of the appointment of a receiver, or any other means whereby his property is taken into the custody of the court or taken out of the custody of the owner and out of his free control, as in *Noonan v. Orton*, 30 *Wis.* 356, which, in the ordinary course of things, causes damage not reached by a mere judgment of vindication or for costs, is sufficient. This action was not commenced by service of a summons and prosecuted without the person or property of the defendant being interfered with directly to his damage; but, as before indicated, the defendant was deprived of the possession of his property, and a growing business, of which he was part owner, was abruptly stopped and closed out, necessarily causing loss to him, not only by depreciation in the value of the firm assets, but by destruction of the business in which the property was used, and by injuring respondent's good name and fair fame as a merchant and member of the community.

The further point is made that the complaint is insufficient because it does not contain an allegation that the plaintiff was damaged by the wrongs complained of to some specific amount. That must be ruled against appellant on the well-

settled principle that, where damages are necessarily inferable from the facts alleged, a statement of such facts sufficiently states the damages: *Luessen v. Oshkosh etc. Power Co.*, 109 Wis. 94, 85 N. W. 124, 4 Ency. of Pl. & Pr. 618.

By the Court. The order appealed from is affirmed.

An Action for Malicious Prosecution of a civil action may be maintained, although there was no interference with the person or property of the defendant: *McPherson v. Runyon*, 41 Minn. 524, 16 Am. St. Rep. 727, 43 N. W. 392; *Antcliff v. June*, 81 Mich. 477, 21 Am. St. Rep. 533, 45 N. W. 1019; *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, 36 N. W. 664; *Smith v. Burrus*, 106 Mo. 94, 27 Am. St. Rep. 329, 16 S. W. 881; *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, 71 N. W. 558. Compare *Norcross v. Otis*, 152 Pa. St. 481, 34 Am. St. Rep. 669, 25 Atl. 575; *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 76 Am. St. Rep. 433, 56 N. E. 198; *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 67 Am. St. Rep. 242, 51 N. E. 569.

In an Action for Malicious Prosecution of a civil action, the plaintiff must show that the suit complained of has terminated: *Brown v. Wellington*, 106 Mass. 318, 8 Am. Rep. 330. As to how far this principle is applicable to malicious prosecutions of criminal actions, see *Satilla Mfg. Co. v. Cason*, 98 Ga. 14, 58 Am. St. Rep. 287, 25 S. E. 909; monographic note to *Ross v. Hixon*, 26 Am. St. Rep. 135-137; *Page v. Citizens' Bank. Co.*, 111 Ga. 73, 78 Am. St. Rep. 144, 36 S. E. 418.

CASES
IN THE
SUPREME COURT
OF
WYOMING.

PALMER v. STATE.

[9 Wyo. 40, 59 Pac. 793.]

HOMICIDE—SELF-DEFENSE—ASSAULT IN DOMICILE.—

A person assaulted in his own house need not retreat, although he can do so without increasing his own danger, before he may lawfully resist, even to the taking of the life of his assailant. (p. 912.)

HOMICIDE—SELF-DEFENSE.—A PERSON ASSAULTED UPON HIS OWN GROUNDS, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat, but may stand his ground and defend himself with such means as are within his control, and to the extent necessary to save his life. (p. 914.)

HOMICIDE—SELF-DEFENSE—ASSAULT IN DOMICILE.—

Every person has a right to pursue his peaceful avocations in his own house and about his own premises, unmolested by threats, or violence, or unlawful interference by any other person. If, while pursuing these avocations, he is violently attacked in a manner indicating a purpose to perpetrate a known felony upon him, such as murder, mayhem, or the like, he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. (p. 915.)

INSTRUCTIONS CONTAINING INCONSISTENT AND ERRONEOUS STATEMENTS of law are ground for reversal. (p. 915.)

TRIAL.—EXCEPTIONS TO INSTRUCTIONS and to the charge generally as given, at the first opportunity when they are read to the jury, is sufficient, especially when the instructions given for the state contain an erroneous statement of the law, and are directly antagonistic to those asked by the defendant. (p. 916.)

HOMICIDE—SELF-DEFENSE—ASSAULT IN DOMICILE.—

One who starts out upon an expedition which involves a felonious assault upon another in his own house takes his life in his hand, and the right to take it from him only upon the apparent necessity which he himself may create. The person so assaulted has the right to defend himself and to pursue his adversary until he has freed himself from all danger. (p. 916.)

HOMICIDE—SELF-DEFENSE.—Whether the accused was under an apparent necessity of killing his assailant, and whether the killing was prompted by such necessity or by other motives, are questions to be determined by the jury. (p. 916.)

M. C. Brown, for the appellant.

J. A. Van Orsdel, attorney general, for the state.

43 **CORN, J.** The defendant, plaintiff in error, was tried upon an information charging him with the murder of one Joseph Demars, found guilty of manslaughter, and sentenced to the penitentiary for a term of ten years. He claimed that the shooting was done in self-defense, and says that he did not have a fair trial, for the reason, among others, that the jury was erroneously instructed. By the motion for a new trial instructions 8, 9, and 11, given upon the request of the prosecution, were specially pointed out as erroneous and prejudicial to the defendant.

For the purpose of testing the instructions a brief statement of certain facts which characterized the case will be sufficient. Defendant and deceased were at a dancing party, where deceased, being partially intoxicated, sought a quarrel with defendant, which he tried to avoid. Deceased finally assaulted him about 1 o'clock in the morning, but defendant got the better of it, and deceased cried, "Enough." Deceased shortly afterward went to sleep in a room near the hall where the dancing was, and the defendant, being warned that he had better look out for Demars, that he intended to attack him again, and that he was a "hard man," in order to avoid any further difficulty, got on his horse and went home, a distance of about seven miles, lay down and went to sleep. Demars awoke about daylight, and was looking for defendant, threatening that he would beat him to death; that he would kill him before sundown, etc. At this time deceased was sober. Upon being informed that Palmer had gone home, he immediately started after him, saying that he would kill him before night. Upon reaching the defendant's place, he pushed or burst open the door, which was fastened upon the inside by a wooden button, and assaulted Palmer in **44** bed by striking him on the head with his fist. They again fought, deceased repeating that he would beat him to death before night, kill him before the sun went down, etc. Defendant got the better of him, and deceased said he would quit. Upon being released Demars returned to the attack, repeating his

threats. This occurred two or three times. No one was at the ranch but deceased and defendant. In concluding his statement of the transaction from the witness stand, defendant testified: "I was pretty near worn out. I was tired of fighting. I saw he was going to wear me out—do me up, and I caught him by the throat. He was trying to bite me all the time we were scuffling. He did come near biting me two or three times—bit my hand. I got loose from him and run for the pistol that was hanging in the kitchen. I run and opened the door, reached for the pistol, grabbed it out of the scabbard and whirled around; when I turned round he was on his feet coming toward me. I fired at him. He went down toward the foot of the bed. I kept on shooting and shot two more shots, and when I quit shooting he was there lying on his face. I went out of the room and got my horse and went over and told Mr. Handley what I had done, and got him to come back to the ranch, and sent for the justice of the peace to come." The proof was that the reputation of the deceased as a peaceable man was bad. The foregoing statement is not given as the only conclusion which the jury could reach upon a consideration of the whole case, but as a conclusion which they were authorized to reach under the evidence, and which the court, not being empowered to pass upon the weight of the evidence, could not reject in giving its charge to the jury. But that the deceased was the aggressor, that he pursued the defendant to his own home and repeatedly assaulted him there, while at the same time expressing his determination to kill him before night, are facts which are not controverted by the prosecution.

With these facts characterizing the case, all instructions which informed the jury that it was the duty of the defendant ⁴⁵ to retreat before he would be justified in whatever resistance might be, or might reasonably seem to be, necessary against the assault of the deceased, were necessarily inapplicable to the evidence, misleading, and prejudicial to the defendant. It is not the law that one assaulted in his own house must retreat, provided he can do so without increasing his own danger, before he may lawfully resist, even to the taking of the life of his assailant. It is unquestionably true that the law does not permit one who is assailed to take life unless it is apparently necessary under the circumstances. But the two propositions are not in conflict. He must not take life except in case of apparent necessity,

but the law does not require that he shall avoid the necessity by retreating before his assailant. His house is his castle, and when it is invaded, he is deemed to be "at the wall," and no further retreat is required: 2 Bishop's Criminal Law, 653; Pond v. People, 8 Mich. 177; Erwin v. State, 29 Ohio St. 188, 23 Am. Rep. 733.

The defendant in this case had retreated seven miles to his own home, and there is no intimation whatever in the evidence that it was not in good faith to avoid any further difficulty with the deceased. But, under these facts, in one of the instructions complained of is found the following language: "If the defendant went out of the room where he had had a difficulty with the deceased, and went into the kitchen for the purpose of getting his gun, and after getting his gun returned into the room to seek a further difficulty with the deceased, or if, after being outside the room, he could have withdrawn from the danger (if you find from the evidence that there was danger at the time) with safety, it was his duty to retreat. Between his duty to retreat and his right to kill, he must retreat if he could do so with safety. By retreat is only meant that a party must avail himself of any apparent and reasonable avenues of escape by which his danger may be averted, and the necessity of striking his assailant avoided. But if the attack is of such a nature, or the weapon of such a character, that to attempt to retreat might increase the ⁴⁶ danger, the party need retreat no further." This statement of the law is apparently the result of an attempt to adapt to the circumstances of this case an instruction which we find approved in People v. Iams, 57 Cal. 119. In that case the evidence showed that defendant and deceased were talking together. Defendant was heard to tell the deceased to come out with whatever he had. Deceased said he had nothing to come out with except a pocket knife. Deceased was holding an armful of wood at that time. Defendant then had his pistol in his hand. Defendant then told deceased to look out, and deceased then threw his armful of wood down and threw up his arms, standing still, and telling the defendant to shoot if he wanted to. Defendant immediately shot the deceased three times. The deceased was not seen to make any perceptible advance on the defendant, or to have any weapon or arms of any kind. Defendant relied for his defense upon the fact that deceased had formerly threatened him. The facts in the two cases are in

such contrast that it is not surprising that the attempt to adapt the instructions in the one to the other should result in giving to the jury for their guidance legal principles inapplicable to the facts and prejudicial to the defendant.

Again, in the eighth instruction, given upon the request of the prosecution, this language is used: "If one is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm, from which death or permanent injury may follow, in such a case he may lawfully kill his assailant. When? Provided he use all the means in his power otherwise to save his own life, or prevent the intended harm, such as retreating or disabling him without killing him, if it be in his power." In a similar case the supreme court of Ohio condemned an instruction on account of language almost identical with that above quoted. The court say: "Under the charge below, notwithstanding the defendant may have been without fault, and so assaulted, with the necessity of taking life to save his own upon him, still ⁴⁷ the jury could not have acquitted, if they found he had failed to do all in his power otherwise to save his own life, or prevent the intended harm, as retreating as far as he could, etc. In this, we think the law was not correctly stated": *Erwin v. State*, 29 Ohio St. 200, 23 Am. Rep. 733.

Again, in the ninth instruction the court uses this language: "A man assailed upon his own grounds, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat, but may stand his ground and defend himself with such means as are within his control; and so long as there is no intent on his part to kill his antagonist, and no purpose of doing anything beyond what is necessary to save his own life, is not guilty of murder or manslaughter if death results to his antagonist from a blow given him under such circumstances." From this statement the jury must necessarily have inferred that if the killing was intentional the defendant could not be excused or justified, although he was assailed upon his own grounds, without provocation, by a person seeking his life, and although the killing was necessary to save his own life. That this is not the law is so clear as to require no reference to authorities. Indeed, the instructions describe with substantial accuracy the defense which is permissible in protecting one's property, or in repelling an assault where there is no apparent intention upon the part of the assailant to kill or do great bodily harm: 2 Bish-

op's Criminal Law, 641, 642. It falls very far short, however, of stating the law when the assault is made upon one in his own house, and is of such a nature as to indicate the intention of his assailant to inflict upon him death or great bodily harm. We think the law is very well stated in the thirteenth instruction given upon the request of the defendant: "Every man has a right to pursue his peaceful avocations in his own house and about his own premises unmolested by threats, or violence, or unlawful interference by any other person or persons, and if, while pursuing these avocations, he is violently attacked in a manner ⁴⁸ indicating a purpose to perpetrate a known felony upon him, such as murder, mayhem, or the like, under such circumstances he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger: 2 Bishop's Criminal Law, 636. But it is apparent that this statement of the law is inconsistent with that contained in the other parts of the charge before referred to. That it was material cannot be doubted. Indeed, it went to the very substance of the defense. In such cases the judgment must be reversed, for this court cannot determine whether the jury followed the correct or erroneous statement of the law: 2 Thompson on Trials, 2326; State v. Peel, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 174.

It is objected, however, that the exceptions to the charge were not sufficiently preserved, and are not properly before this court for its consideration. In allowing the bill of exceptions, the court says: "And the court, having examined the said bill of exceptions at length, and finding the same correct, except in this, that no exceptions or objections were made or taken to any of the instructions given for the prosecution, and set forth as grounds for a new trial by the defendant, at or before the time said instructions were given and read to the jury, objection being made generally to all of the instructions given for the prosecution after the same were read to the jury, and the court now here in open court approves the same and orders that it be filed and made a part of the record in this case." The rule under our statute is that the party objecting to a decision of the court must except at the time the decision is made, and this court has no disposition to relax the rule. But it must have a reasonable construction. The exception must be taken in time and be sufficiently specific to point out the matter complained of so that the trial court may have opportunity to correct its own errors. The law

does not contemplate that a defendant may permit his case to be tried in the court below upon one theory without objection, and then come into this court to complain that another was the true one. But ⁴⁹ that is not this case. There is no intimation that the instructions were submitted to counsel for the defendant before they were read to the jury, or that counsel consented or failed to object to the statement of the law contained in them. So far as appears, the first opportunity to object was when they were read to the jury. There is certainly no presumption that they were consenting when they had asked for and had obtained the approval of the court to instructions directly antagonistic to those given on behalf of the state.

We think also the character of objection made was sufficient in this case. It was to the charge itself, the law of the case as embodied in the instructions for the state. We are cited to numerous cases where it has been held that a failure of the court to state a pertinent legal principle, when it has not been requested, is not error; as, for instance, a failure to define the terms, "malice," "reasonable doubt," or the like. But the distinction is plain. If counsel desire to have the jury instructed more in detail than the court may deem necessary, they must ask for such instructions, otherwise it is reasonable to presume they concurred with the court in the opinion that the jury was sufficiently informed as to such matters. Or they may have deemed that they could present to the jury in argument a definition or explanation which would be more favorable to their client's case than one which the court might give. No such considerations apply here. The defense requested instructions which they deemed applicable to the case, and objected to the instructions for the state as a whole as presenting an inconsistent and erroneous view of the law as applied to the facts. In all cases the charge to the jury should disclose the law applicable to whatever facts the evidence tends to establish, not to any which it does not: 1 Bishop's Criminal Law, sec. 387. We think the instructions for the state as a whole present an erroneous view of the law as applied to the facts of this case, and that the exception was sufficient.

It will be understood that there is nothing in this opinion ⁵⁰ which withdraws from the jury any issue of fact involved in the case. Whether the defendant at the time was under an apparent necessity to kill his assailant, and whether the killing was prompted by such necessity, or by other motives,

are questions to be determined by the jury. But it was uncontroverted upon the former trial that the deceased, after assaulting the defendant, and threatening his life, pursued him, invaded his house, and assaulted him there with the avowed purpose of killing him. Under the conditions in this state, the rule of law, stated in this opinion, is especially applicable. There are many lonely ranches miles away from any help or any safe place of retreat, and they are not infrequently occupied by persons without other protection or defense than that which they can make for themselves. That any man or woman so situated must first look about for means of escape before they can defend themselves against impending danger is not the law. It would not benefit community or tend to make life safer. We think it is better that it should be clearly stated and understood that one who starts out upon an expedition which involves a felonious assault upon another in his own house takes his life in his hand, and the right to take it from him depends only upon the apparent necessity which he himself may create. The person so assaulted has the right to defend himself, and to pursue his adversary until he has freed himself from all danger. Whether the defendant kept himself within these principles is the issue which should be presented to the jury for their decision.

The judgment will be reversed, and the cause remanded for a new trial.

Potter, C. J., and Knight, J., concur.

Self-defense.—A person while in his own dwelling-house is not required to retreat from one assaulting him, without regard to the nature of the assault or the intent of the assailant. And while the fact that he is in his own house does not justify him in using more force than is necessary, or in killing his assailant to prevent a mere assault, yet if the assault is fierce and violent he may repel force with force, and use such means as are reasonably necessary to protect himself from harm. And this, to the extent of taking life, if necessary, to preserve his own life or to prevent great bodily harm: *Elder v. State*, 69 Ark. 648, 86 Am. St. Rep. 220, 65 S. W. 938; monographic note to *State v. Sumner*, 74 Am. St. Rep. 740. The law of defense of habitation, however, is not applicable to the protection of property: *Utterback v. Commonwealth*, 105 Ky. 723, 88 Am. St. Rep. 000, 29 S. W. 479.

FARM INVESTMENT COMPANY v. CARPENTER.

[9 Wyo. 110, 61 Pac. 258.]

WATERS AND WATERCOURSES—APPROPRIATION.—A right to the use of water may be acquired in Wyoming by priority of appropriation for beneficial purposes, in contravention of the common-law rule that every riparian proprietor is entitled to the continued natural flow of the water of the stream running through or adjacent to his lands. (p. 921.)

WATERS AND WATERCOURSES.—APPROPRIATION OF WATER CONSISTS of its diversion by some adequate means, and its application to a beneficial use. (p. 921.)

CONSTITUTIONAL LAW—TITLE OF ACT.—If but one general and comprehensive subject is contained in a statute, and all its provisions are germane to that subject, the statute is not unconstitutional as "containing more than one subject, which shall be clearly expressed in the title." (p. 930.)

CONSTITUTIONAL LAW—TITLE OF ACT.—"An act providing for the supervision and use of the waters of the state," providing for the adjudication of such right of use by the state board of control, contains but one general subject, which is clearly expressed in its title. (p. 930.)

CONSTITUTIONAL LAW.—Statutes must receive every presumption in favor of their validity, and are not to be overthrown by courts, unless clearly unconstitutional. (p. 931.)

CONSTITUTIONAL LAW—APPROPRIATION OF WATER. A state constitutional declaration that the water of natural streams in the state is the property of the state is valid and effectual as to all water, subject to prior appropriation. (p. 933.)

WATERS AND WATERCOURSES — APPROPRIATION.—Where the doctrine prevails that water may be acquired by prior appropriation, the water affected by such doctrine becomes publici juris, and a constitutional or statutory declaration that such water is public property announces no new rule or principle. (p. 934.)

WATERS AND WATERCOURSES.—CONSTITUTIONAL OR STATUTORY DECLARATIONS, not interfering with existing vested rights, that the water of natural streams or other natural bodies of water in the state is public property, and subject to prior appropriation are valid and effective. (p. 934.)

WATERS AND WATERCOURSES—STATE OWNERSHIP.—By constitutional or statutory declarations that the water in the natural streams or other natural bodies of water in the state is the "property of the public," or "property of the state," the state is vested with jurisdiction and control of it in its sovereign capacity. (p. 935.)

WATERS AND WATERCOURSES—RIGHTS ACQUIRED BY PRIOR APPROPRIATION.—A prior appropriator of the water of a natural stream secures a property right therein, but he does not acquire title to the running water, except, it may be, to such quantity as shall, from time to time, have been lawfully diverted and after diversion may be running in his ditch or lateral. (p. 935.)

WATERS AND WATERCOURSES — APPROPRIATION.—POWER TO REGULATE.—The state has power to regulate prior, as well as subsequent, rights of appropriation of water, and as all rights of appropriation partake of the same general characteristics,

differing essentially only in priority and quantity, and possibly in purpose, it follows that if various rights are connected with the same stream, a subsequent claim cannot be successfully regulated without including in the regulations all rights both prior and subsequent. (p. 936.)

WATERS AND WATERCOURSES—APPROPRIATION—STATE BOARD OF CONTROL.—A statute conferring upon a state board of control the power to adjudicate the priorities of various claimants to the use of the public waters of the state is not void, as investing the board with judicial power, as it acts in an administrative capacity, and its determination is at most quasi judicial only. (pp. 937, 940.)

WATERS AND WATERCOURSES—APPROPRIATION—STATE CONTROL—ADJUDICATIONS—DUTY OF CLAIMANTS. A statute conferring upon a state board of control power to adjudicate the priorities of claimants to the use of public water may legally require all claimants, both prior and subsequent to the passage of the act, to submit their claims upon proper notice for determination by such board of control. (pp. 940, 941.)

WATERS AND WATER RIGHTS—APPROPRIATION—STATE CONTROL—EFFECT OF ADJUDICATION.—If a statute confers upon a state board of control power to adjudicate, after notice, the priorities of claimants to the use of public water, any matter actually and legally determined by final decree of such board, in the absence of fraud or collusion, becomes *res judicata*, at least as to the public and the parties participating in the proceedings. (p. 942.)

WATERS AND WATER RIGHTS—APPROPRIATION—STATE CONTROL—EFFECT OF ADJUDICATION AGAINST CLAIMANT WITHOUT NOTICE OR APPEARANCE.—Under a statute conferring upon a state board of control power to adjudicate, after notice, the priorities of claimants to the public waters of the state, not imposing any penalty upon a claimant who fails to appear and submit proofs of his claim, an existing claimant is not concluded by a determination by such board in adjudication proceedings, if he has not appeared, and his right has not been considered. (pp. 942, 944.)

WATERS AND WATER RIGHTS—APPROPRIATION—STATE CONTROL—EFFECT OF ADJUDICATION.—If a statute conferring upon a state board of control power to adjudicate, after notice, the priorities of claimants to the public waters of the state, makes no provision expressly estopping a claimant failing to participate in adjudication proceedings, and as the decree is not *res judicata* as to his undetermined rights, he is at liberty to assert and maintain them in the courts, subject to the rule that in the absence of fraud or of facts sufficient to vitiate an adjudication, courts will not assume, in an independent action, to determine anew the rights of parties, which as between themselves have been settled by a decree of such board of control. (pp. 945, 946.)

WATERS AND WATER RIGHTS—APPROPRIATION—STATE CONTROL—NOTICE TO CLAIMANTS BY MAIL.—A statutory provision for notice by registered mail to known claimants as prior appropriators of water as to the time for the taking of testimony in adjudication proceedings as to the rights of such claimants, is valid, and not objectionable as not constituting notice by due process of law. (p. 946.)

APPELLATE PRACTICE.—IN RESERVED CASES a question whether an answer is sufficient to constitute a defense will not be answered on appeal, but must be decided by the trial court. (p. 946.)

J. W. McCreery and A. Bennett, for the appellant.

C. H. Parmelee and G. E. A. Moeller, for the appellee.

120 POTTER, C. J. This suit was instituted in the district court of Johnson county for the purpose of securing a decree quieting the title of plaintiff to the right to use water from French creek, for the irrigation of certain lands, as against each and all of the defendants, who, it is alleged, are asserting prior and superior rights to the plaintiff.

An appropriation by plaintiff's grantor in the year 1879, and the continued use and application of the water so appropriated, is set out, and in consequence thereof, a right superior to the defendants is alleged to reside in the plaintiff.

The answer of but one of the defendants is in the record. Admitting the original appropriation alleged in the petition, and the ownership of plaintiff to the water right acquired thereby, if any, the answer, by a separate defense, after disclosing the claim of the answering defendant to the use of certain of the waters of the stream for irrigation purposes, by reason of an appropriation in 1883, sets up an adjudication by the state board of control of the rights of the various claimants to the use of the water of said stream, on or about October, 1893, in accordance with the provisions of chapter 8 of the Laws of 1890-91, the same being an act entitled, "An act providing for the supervision and use of the waters of the state." It is alleged that all the notices required by said act were duly given and published, and that the plaintiff had actual notice, and that the proceedings were conducted in accordance with the statutory provisions; and that **121** neither the plaintiff nor his grantors appeared, or submitted any proof of their alleged rights. It is also alleged that by the order of the said board in that proceeding the defendant was awarded a certain priority for a definite quantity of water, for which a certificate was issued to him, and that "no amount of water whatever was awarded or decreed to the plaintiff or to any other person for use upon the lands described in said plaintiff's petition." Wherefore, it is averred that the plaintiff has abandoned its rights, and is now estopped from asserting the same. To this defense plaintiff filed a general demurrer, upon the consideration of which the district court ordered that the following questions, being deemed difficult and important, be reserved for the decision of this court:

"1. Is the board of control of the state of Wyoming, provided for by article 8, section 2 of the constitution of Wyoming, vested with judicial power in such manner that it may adjudicate and determine the rights of priority among claimants to the use of water for beneficial uses from the public streams of this state?

"2. Is chapter 8 of the Laws of Wyoming of 1890-1891, the same being an act entitled 'An act providing for the supervision and use of the waters of the state,' or the sections of said chapter which authorize the board of control to adjudicate water rights, and providing a system of procedure therefor, constitutional?

"3. If the board of control be a legal tribunal for the adjudication of water rights, and the act in question constitutional, are such provisions retroactive, and are claimants of prior rights to the use of water, which were acquired prior to the adoption of the constitution and passage of the acts in question required to submit their rights to the adjudication of said board?

"4. In case claimants of water rights, which accrued, as stated in the petition herein, before the adoption of the constitution, do not submit their rights to said board for adjudication, when proceedings are had under the provisions of the act by the board of control for the ¹²² adjudication of the rights of the stream out of which said claimants take their water, are they then concluded or estopped by such adjudication?

"5. Do the provisions of the statute providing for publication of notice, and notice by mail, and without actual citation or service of summons, constitute due process of law whereby the titles of persons to water rights for beneficial uses may be determined?

"6. Does the answer or defense to which the demurrer was interposed constitute a sufficient answer or defense to plaintiff's complaint, under the law?"

In this state, the doctrine prevails that a right to the use of water may be acquired by priority of appropriation for beneficial purpose, in contravention to the common-law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands. The appropriation consists in a diversion of the water by some adequate means, and its application to a beneficial

use: *Moyer v. Preston*, 6 Wyo. 308, 71 Am. St. Rep. 714, 44 Pac. 845.

It is doubtful if any questions of graver importance than those affecting water rights are presented for judicial consideration. Notwithstanding the settlement of the fundamental doctrine and its recognition by our constitution and statutes, the law respecting it in many of its phases may be said to be still in course of development, and, compared with other questions which are likely to arise relating to this general subject, it is probable that none will exceed in importance those involved and submitted for determination in this controversy. They strike at the root of the system adopted in this state for the supervision and distribution of the appropriated waters.

As introductory to the discussion of the reserved questions, we will undertake a very brief survey of the leading features of local legislation and conditions existing anterior to the framing and adoption of the constitution, and the enactment of the statute out of which the contentions in the case at bar arise.

¹²³ Legislative attention was first directed to this subject in 1875. The act of that year declared that those having a possessory right or title to land "on the bank, margin, or neighborhood of any stream" should be entitled to the use of the water thereof for the purpose of irrigation, and to a right of way over the lands of others for the construction of irrigating ditches. Provision was also made for the just and equitable allotment of water in times of scarcity through the agency of commissioners, who, when appointed and required to act, were to make the apportionment for the interest of all parties concerned, and with due regard to the legal rights of all.

At the time of the passage of the act of 1875, the territory was very sparsely settled, and comparatively but little had been accomplished toward the cultivation of the soil. It is a fact nevertheless that from the earliest settlement of the territory, irrigation, although in a limited degree, had been practiced by means of the diversion of the water of natural streams, and land had thereby been brought under successful cultivation; and in certain portions of the territory, water rights had been acquired for the purpose of mining, and possibly in aid of other industries.

It is safe to say, however, that while irrigation had been resorted to sufficiently to demand legislative recognition as

early as 1875, and the right to appropriate water for beneficial uses had been from the beginning continually asserted and recognized by prevailing custom and usage, it had not then attained such proportions as to exact much public interference or regulation.

With the increasing settlement of the public lands, and the impetus furnished to their reclamation through the enactment by Congress in 1877 of the desert land act, water appropriations and irrigation works were rapidly augmented in number and value, until, in 1886, many valuable water rights had been acquired, and title to considerable public land had been secured by patent from the general government in consequence of such settlement ¹²⁴ and reclamation. The settlement of the public lands, with but few exceptions, if any, although the entry may have been made under the homestead or pre-emption laws, was expedited, if indeed it was not solely rendered possible, by the facilities afforded by nature, the customs and laws for the irrigation thereof. Thus the cultivation, and even the occupation, of the lands within the territory had been attended with the expenditure of much capital and labor, and the very existence of the homes of a large class of citizens, as well as the productiveness of the soil, depended upon the security to be afforded the appropriations of water which had been made; and in view of the many rights already accrued, and the inception of new ones which would necessarily accompany the continued growth of the territory, the welfare of the entire people became deeply concerned in a wise, economical, and orderly regulation of the use of the waters of the public streams.

It was realized that more adequate laws were demanded to duly protect this important industrial interest, give stability to its values, assist in a desirable conservation of the waters, and avoid confusion and difficulty in their distribution. A striking advance along these lines was made by an act of the territorial legislature of 1886, although the imperfections of that law soon asserted themselves.

It is no part of our purpose to dwell in detail upon the provisions of that act, for they do not concern the present inquiry, except in so far as, together with other legislation, they tend to illustrate the development of our existing system, and the influences which led to the constitutional expressions, and the inauguration of the scheme incorporated in the act of 1890-91.

Succinctly stated, the act of 1886 embraced a declaration that the water of every natural stream was the property of the public and dedicated to the use of the people, subject to appropriation; the division of the territory into irrigation districts, not as public corporations, but as including specified territory, within each of which ¹²⁵ districts a water commissioner was to be appointed with general authority to divide the water in the streams in his district among the several ditches according to their respective prior rights; the creation of a special proceeding for the adjudication of the priorities of rights upon the same stream within the same district, in the particular district court vested by the act with jurisdiction therein—the districts within the jurisdiction of each district court being designated; and a provision requiring every claimant to a water right to file a statement of claim thereof under oath, with the county clerk and clerk of court, on or before September 1, 1886, and every subsequent claimant to so file a similar claim before commencing the construction of his diverting works: See Rev. Stats. 1887, secs. 1331-1361.

The special proceeding for adjudication was purely statutory, and the only reason for its creation is to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream, by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water. A similar proceeding in Colorado has been held to be based upon or to grow out of the police power of the state: *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 55 Am. St. Rep. 149, 45 Pac. 444; *White v. Highline Canal etc. Co.*, 22 Colo. 191, 43 Pac. 1028. See, also, *Louden etc. Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 110, 43 Pac. 535.

The persons instituting the proceeding were not required to allege any injury to them or their property, nor any facts necessary to constitute a cause of action at law, or ground for relief in equity. The purpose of the adjudication was a decree settling the various priorities of right from the same stream, and the issuance thereunder of a certificate to each appropriator represented, showing his relative priority and the quantity of water to which he should be found entitled. The decree could be reopened at any time within two years, and could be reviewed ¹²⁶ with or without reargument, or additional evi-

dence, and an appeal could be taken to the supreme court. The proceedings were largely informal, and it was permitted the court or judge to appoint a referee to take the testimony.

The same legislature provided, by another act, for an official survey of the several ditches, or canals, connected with the appropriation of water by county surveyors, at the expense of the owners. The certificate of the surveyor showing the result of the survey was required to be filed with the proper clerk of court: Rev. Stats. 1887, secs. 1362-1365.

It is known that a few adjudications, but not many, occurred under proceedings afforded by the act of 1886. In 1888, the office of territorial engineer was created with general power of supervision of the diversion and division of the public waters, and of the work of the water commissioners. It was exacted of that officer that he measure and ascertain the carrying capacity of any ditch at the request of an interested party, and furnish a certificate thereof, and to measure and calculate the flow of the waters of each stream drawn upon for irrigation purposes. He was further required to collect facts and make reports as to a system of reservoirs, become conversant with the waterways of the territory, and to suggest from time to time the amendment of existing or enactment of new laws as his information and experience should suggest. A copy of all decrees in the special proceedings, under the law of 1886, was required to be forwarded to the engineer, recorded in his office, and the particulars thereof furnished the appropriate commissioner: Laws 1888, c. 55.

The act of 1888 also declared the waters of the natural streams to be public, and dedicated to the people, subject to appropriation, and made new regulations—largely a repetition of the former—as to the recording of claims, but discarded the office of clerk of court as a place for such record. Another act of the same assembly repealed the provisions relating to a survey of ditches by county surveyors.

¹²⁷ We might be justified in adverting to other interesting particulars of the laws of 1886 and 1888; but we apprehend that sufficient reference to those laws has been made to show the conditions existing when the constitution was adopted, and to illustrate what we conceive to be the fact, that in the progress of our legislation in respect to the use of water for irrigation and other beneficial purposes, the significant feature of the changes and additions from time to time has been the principle of centralized public control and regulation. One

can hardly fail to be impressed with the gradual tendency exhibited in the various acts toward the greater effectiveness of public supervision.

The expressions of the constitution relating to irrigation and water rights are as follows:

"Water being essential to industrial prosperity, of limited amount and easy of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved": Const., art. 1, sec. 31.

"The water of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state": Const., art. 8, sec. 1.

"There shall be constituted a board of control to be composed of the state engineer and superintendents of the water divisions, which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state, and of their appropriation, distribution, and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state": Const., art. 8, sec. 2.

"Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests": Const., art. 8, sec. 3.

"The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof": Const., art. 8, sec. 4.

¹²⁸ "There shall be a state engineer, who shall be appointed by the governor of the state and confirmed by the senate; he shall hold his office for the term of six (6) years, or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position": Const., art. 8, sec. 5.

Pursuant to the constitutional requirements, the first state legislature, by an act entitled, "An act providing for the supervision and use of the waters of the state," approved December 22, 1890, created the state board of control, divided the

state into four water divisions, and provided for the appointment of a superintendent for each division. The office of water commissioner is retained, who becomes the local official charged with the duty of dividing the waters in his district among the several claimants, according to their respective priority of rights, under the general supervision of the board, superintendents, and state engineer. Water districts are required to be established by the board of control as priorities of appropriation are adjudicated.

The duty was devolved upon the various county clerks to transmit to the state engineer within thirty days a transcript of all claims to appropriations of water on file in their respective offices; and where an original record thereof was contained in books kept for that purpose, the original records of claims were to be transmitted instead of an abstract. The clerks of court were likewise required to forward to the engineer the certificates of county surveyors on file in their respective offices, showing the measurements of ditches. Thereafter before any person shall commence the construction, enlargement, or extension of any distributing works, or performing any work in connection with an intent to appropriate any of the ¹²⁹ public waters of the state, it was, and is, exacted of him that he apply to the president of the board of control for a permit to make such appropriation. Complete regulations controlling the action of the engineer in approving or rejecting the application are embraced in the act, including provisions for an appeal from the action of the engineer in rejecting an application to the board, and from the order of the board thereon to the district court.

By the act in question, also, a system of procedure to be inaugurated and conducted by the board is established, wherein and whereby the board is directed and empowered to ascertain, adjudicate and determine the priorities of rights of the various claimants from the same stream, and the former legislation authorizing such adjudication by a special proceeding in the district court is repealed. It was provided, however, that all cases in such special proceedings then pending in the courts might be retained therein and proceed to final determination, in accordance with the laws in force at the time of their inception; or that such cases, or any of them, might be transferred, on the application of the interested parties, to the board of control.

The jurisdiction and authority of the board of control to make the determination as required by the act, and the power of the legislature to confer that authority upon the board, is contested in the case at bar, and the several questions reserved for the decision of this court depend for their solution upon a consideration of the validity and effect of that portion of the act making provision for the adjudication.

The act of December 22, 1890, is, as amended in some particulars immaterial to the present inquiry, contained in the Revised Statutes of 1899, and in sections 859 to 887, inclusive. Sections 859 and 860 are as follows:

"Sec. 859. It shall be the duty of the board, at its first meeting, to make proper arrangements for beginning the determination of the priorities of right to the use of the public waters of the state, which determination shall ¹³⁰ begin on the streams most used for irrigation, and be continued as rapidly as practicable, until all the claims for appropriation now on record shall have been adjudicated.

"Sec. 860. The board of control shall decide at their first meeting the streams to be first adjudicated, and shall fix a time for beginning of taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants."

Concerning the proceedings preliminary to an order of determination, it will sufficiently answer our purpose to state that notices are required to be published, and sent by registered mail to each person having a recorded claim to waters of the stream or streams embraced in the adjudication proceedings, showing when the engineer will begin a measurement of the stream and the several diverting works, and the time and place when the superintendent will commence the taking of testimony. Accompanying the notice there is required to be sent to the claimant a blank form on which the claimant is required to present in writing, under oath, certain specified facts relating to his appropriation. Upon the completion of the testimony, the same is to be opened to public inspection at a time and place mentioned in a notice thereof to be previously published, and sent by mail to the several claimants.

An opportunity is provided for any interested party to contest before the superintendent and the board the claim of any other persons who may have submitted their proof. Upon the completion of the evidence in the original hearing, and in all contests, the same is required to be transmitted to the board

of control. In the meantime, the engineer or his assistant is required to make an examination and measurement of the stream, and the works diverting water therefrom, as well as of the irrigated lands, or lands susceptible of irrigation, from the various ditches or canals taking water from the stream then under consideration, and to make a map or plat showing the course of the stream, the location of each ditch, and the lands irrigated, or susceptible of irrigation, therefrom. Sections 872 and 873 are as follows:

131 "Sec. 872. At the first regular meeting of the board of control after the completion of such measurement by the state engineer and the return of said evidence by said division superintendent, it shall be the duty of the board of control to make and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made, and the amount of water which shall have been applied for beneficial purposes. Provided, that such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands for the benefit of which the appropriation may have been secured, and the amount of any appropriation made by reason of an enlargement of distributing works, shall be determined in like manner. Provided, that no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made.

"Sec. 873. As soon as practicable, after the determination of the priorities of appropriation of the use of waters of any stream, it shall be the duty of the secretary to issue to each person, association, or corporation represented in such determination, a certificate to be signed by the state engineer, as president of the board of control, and attested under seal by the secretary of said board, setting forth the name and post-office address of the appropriator; the priority number of such appropriations; the amount of water appropriated; and, if such appropriation be for irrigation, a description of the legal subdivisions of land to which said water is to be applied. Such certificate shall be transmitted by said state engineer, or by a member of the board of control in person, or by registered

mail, to the county clerk of the county in which ¹³² such appropriation shall have been made, and it shall be the duty of the county clerk upon the receipt of the recording fee, which fee shall be seventy-five cents, to record the same in a book specially prepared and kept for that purpose, and thereupon immediately transmit the same to the respective appropriators. Said recording fee of seventy-five cents shall be paid to the division superintendent, at the time of the submission of testimony and proof of appropriation of water by each such appropriator or claimant before the said division superintendent, as provided by law, and shall be by him, or the state engineer, transmitted with each certificate of appropriation to the county clerk of the county in which said certificate is to be recorded, and his receipt taken therefor, which said receipt shall be filed in the state engineer's office."

Provision is made for an appeal, by any party feeling himself aggrieved, from the decision of the board to the district court, and from that court to the supreme court.

Counsel for the plaintiff contend that the act of December 22, 1890, is unconstitutional, in so far as it confers upon the board of control authority to determine the priorities of rights to the use of water. Several reasons are urged in support of such contention. In the first place, it is insisted that the act is in conflict with section 24 of article 3 of the constitution, which provides that: "No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject is embraced in the act which is not expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

It is argued that the provisions for adjudication of water rights are not included in the word "supervision," employed in the title, and that in this respect the act is broader than the title, and contains more than one subject. The general principles which should control in a question of this kind are laid down in the case of *In re Fourth* ¹³³ Judicial District, 4 Wyo. 133, 32 Pac. 850, where the whole subject is elaborately discussed. It was there said that: "It is not essential that the title shall specify particularly each and every subdivision of the general subject." If but one general and comprehensive subject is contained in the act, and all the provisions are germane to that subject, then the act cannot be said to

violate either the spirit or letter of the constitutional provision referred to. The title of an act in Colorado was: "An act to regulate the use of water for irrigation, and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation and use." Certain provisions of the act relating to the establishment of maximum rates to be charged by carriers of water were assailed as void, upon the ground that the title contained more than one subject, and the matter of fixing rates was not clearly referred to therein. The court, in discussing the title, said: "In our judgment, the same must have been sufficient had it read, 'An act to regulate the use of water for irrigation.' This is the controlling purpose of the law; the rest of the title refers to nothing not germane to the subject thus expressed. Incidental to a proper regulation of the use of water diverted from natural streams in this state is a determination of the priority of rights in connection therewith. . . . And it requires no argument to demonstrate that a general law intended to fully regulate the use of such water would almost of necessity touch upon the subject of priority of right thereto": *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142.

We think it is not to be reasonably doubted that the one general subject of the act was the supervision of the waters of the state. And we are clearly of the opinion that the matter of determination of the priorities of rights to such waters is a part of the general subject and germane to it.

Another ground urged against the validity of the act is that judicial power is attempted to be conferred upon ¹³⁴ the board of control, in violation of section 1 of article 2 of the constitution, dividing the state government into three distinct departments, and of section 1 of article 5, vesting the judicial power in certain specified courts. This raises a question of vital importance, especially when we consider that during the nine years intervening since the creation of the board it has proceeded, in pursuance of the statute, to determine the priorities of claimants upon numerous streams, and that its certificates issued therein constitute the evidence of title to a large number of water rights. That fact is not to preclude a careful investigation of the serious question presented, nor to control in its disposition, except possibly in so far as it is entitled to weight as showing the construction of the law on the part of the administrative or executive department, and fur-

ther, perhaps, in connection with the elementary principle that a statute is to receive every presumption in favor of its validity, and is not to be overthrown by the courts unless it is clearly unconstitutional.

The provisions of the constitution now invoked in opposition to the statute are as follows: "The powers of the government of this state are divided into three distinct departments: the legislative, executive, and judicial; and no person or collection of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted": Const., art. 2, sec. 1.

"The judicial powers of the state shall be vested in the senate, sitting as a court of impeachment, in a supreme court, district court, justices of the peace, courts of arbitration, and such courts as the legislature may by general law establish for incorporated cities or incorporated towns": Const., art. 5, sec. 1.

The position maintained by counsel is that a determination of the priorities of rights to the use of water involves solely a judicial inquiry into rights to property as between ¹³⁵ private parties; and that the jurisdiction to undertake such an investigation and adjudicate therein can be constitutionally lodged only in some court which is by article 5 of the constitution vested with judicial power.

The statute nowhere attempts to divest the courts of any jurisdiction granted to them by the constitution to redress grievances and afford relief at law or in equity under the ordinary and well-known rules of procedure. A purely statutory proceeding is created to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the board—a proceeding which is to result not in a judgment for damages to a party for injuries sustained, nor the issuance of any writ or process known to the law for the purpose of preventing the unlawful invasion of a party's rights or privileges; but the finality of the proceeding is a settlement or adjustment of the priorities of appropriation of the public waters of the state, and is followed by the issuance of a certificate to each appropriator showing his relative standing among other claimants, and the amount of water to which he is found to be entitled.

At the outset, however, it is strenuously insisted that the declaration contained in the constitution that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force or effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership; and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more than a passing notice.

So far as any proprietary rights of the United States are concerned, the question would seem to be settled in favor of the effectiveness of the declaration, by the act of admission, which embraces the following provision: "And that the constitution which the people of Wyoming have formed for themselves, be, and the same is hereby, accepted, ratified, and confirmed": *McCornick v. Western* ¹³⁶ *Union Tel. Co.*, 79 Fed. 449. In that case, the circuit court of appeals for the eighth circuit of the United States held that under a similar provision in the act of Congress, admitting Utah, all the provisions of the Utah constitution were invested with all authority conferred by any act of Congress.

But is there not a further and deeper reason for upholding the validity and force of the constitutional declaration? Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters are, we think, generally regarded as public in character.

By the civil law the waters of all natural streams were *publici juris*, and according to Bracton that was the rule anciently in England: *Kinney on Irrigation*, sec. 53; *Gould on Waters*, sec. 6. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws and sanctioned by the courts—a public use sufficient to support the exercise of the power of eminent domain: *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 160, 17 Sup. Ct. Rep. 56. This use, and the doctrine supporting it, is founded upon the necessities growing out of natural conditions, and is absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement

and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water.

The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite ¹³⁷ thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become perforce publici juris. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where the doctrine of prior appropriation has at all times been recognized and maintained, an expression by constitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however this may be, we entertain no doubt of the power of the people in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams, and other natural bodies of water, to be the property of the public, or of the state. Nor do we doubt that the legislature may make a like declaration, when in that particular unrestrained by the constitution.

If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by Congress, beginning with the act of July 26, 1866, and including the desert land act of March 3, 1877. Those acts have been too often quoted and are too well understood to require a restatement at this time at the expense of unduly extending this opinion.

It has been held that the act of July 26, 1866, was rather a voluntary recognition by Congress of pre-existing rights, constituting valid claims to a continued use, than the establishment of new rights: *Broder v. Water Co.*, 101 U. S. 274.

By these various acts, "the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law, which permitted the appropriation of ¹³⁸ these waters for

legitimate industries," and, "a state may change the common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems best": *United States v. Rio Grande etc. Irr. Co.*, 174 U. S. 690, 19 Sup. Ct. Rep. 770.

If, as has been said, the title of the general government to the public lands is that of proprietor rather than sovereign (*Kinney on Irrigation*, sec. 145), it would seem that its rights as such are not greater to the waters of the streams flowing across the lands than those of an individual owner.

In Arizona and Nevada, the statutes declare the ownership of the public in the waters of the natural streams: *Clough v. Wing* (Ariz.), 17 Pac. 453; *Kinney on Irrigation*, sec. 407.

The effect of such a declaration has been determined by the courts of Colorado, whose constitution declares that the unappropriated waters of the streams within the state are the property of the public. In the case of *Wheeler v. Northern Colorado Irr. Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487, Mr. Justice Helm, in delivering the opinion of the court, said: "Our constitution dedicates all unappropriated water in the natural streams of the state to the use of the people, the ownership thereof being vested in the public. We shall presently see that, after appropriation, the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator."

Again, in *Fort Morgan Land etc. Co. v. South Platte Ditch Co.*, 18 Colo. 1, 36 Am. St. Rep. 259, 30 Pac. 1032, in the opinion delivered by Mr. Chief Justice Hayt, it is said: "Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of water may be acquired."

There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration ¹³⁹ that the water is the property of the public, and that it is the property of the state.

It is said in *McCready v. Virginia*, 94 U. S. 391, in discussing the subject of tide waters: "In like manner the states own the tide waters themselves. . . . For this purpose, the state

represents its people, and the ownership is that of the people in their united sovereignty": See, also, *Martin v. Waddell*, 16 Pet. 410; Gould on Waters, sec. 32; Kinney on Irrigation, secs. 51, 53; *Bell v. Gough*, 23 N. J. L. 624. "The sovereign is trustee for the public": 3 Kent's Commentaries, 427; *Miller v. Mendenhall*, 43 Minn. 95, 19 Am. St. Rep. 219, 44 N. W. 1141.

The ownership of the state is for the benefit of the public or the people. By either phrase, "property of the public" or "property of the state," the state, as representative of the public or the people, is vested with jurisdiction and control in its sovereign capacity.

The constitutional declaration was not intended to interfere with previously accrued rights to use the public waters of the state, and it does not conflict with such rights. It was, however, by all the constitutional expressions, undoubtedly intended that such rights, and all appropriations, should be regulated upon the basic principles therein enunciated. That the constitutional provision did not impair rights already accrued is apparent not only from the accompanying provisions, but from the nature of such rights. Although an appropriator secures a right, which has been held with good reason to amount to a property right, he does not acquire a title to the running waters themselves, except, it may be, to such quantity as shall from time to time have been lawfully diverted, and after diversion may be running in his ditch or lateral. The title of the appropriator fastens, not upon the water while flowing along its natural channel, but to the use of a limited amount thereof for beneficial purposes, in pursuance of an appropriation lawfully made and continued. The appropriation is made, in the first place, upon the basis of public ownership of the water, and is protected instead of impaired by the constitutional declaration.

¹⁴⁰ There can hardly be any controversy over the power of the state to regulate prior, as well as subsequent, rights of appropriation. In reference to conflicting deeds to the same tract of land, and the validity of recording acts, it was held in a leading case by the supreme court of the United States, that even where a state has originally granted the land to the first individual owner, there is no contract on the part of the state that the priority of title shall depend solely upon the principles of the common law, or that the state shall pass no law imposing on a grantee the performance of acts not

necessary to the legal operation of his deed, at the time of its delivery. "It is within the undoubted power of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act": *Jackson v. Lamphire*, 3 Pet. 280.

All rights acquired by appropriation partake of the same general characteristics, differing essentially only in priority and quantity, and possibly in purpose. Where various rights are connected with the same stream or body of water, a subsequent claim cannot be successfully regulated without including in the regulations all rights. The water to which the use of each attaches is public, and the people as a whole are intensely interested in its economical, orderly, and inexpensive distribution. It is a matter of public concern that the various diversions shall occur with as little friction as possible, and that there shall be such a reasonable and just use and conservation of the waters as shall redound more greatly to the general welfare, and advance material wealth and prosperity.

In a Colorado case it was said: "From the very nature of the business, controversies with reference to the use of water naturally led to unseemingly breaches of the peace, and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and ¹⁴¹ regulating its distribution to those entitled thereto. Authority for such regulations may properly be based upon the principle that when private property is affected by a public interest, it ceases to be *juris privati* only": *White v. Highline Ditch etc. Co.*, 22 Colo. 191, 43 Pac. 1028.

From any standpoint we think it is clear that the declaration that the waters subject to appropriation for beneficial purposes are the property of the state is valid and effectual.

The other fundamental principles expressed in the constitution are, that control of the public waters must be in the state, which in providing for their use shall equally guard all the various interests involved. Such control shall consist in a supervision of the waters, their appropriation, distribution, and diversion by a board of control, to be composed of certain designated officers, with an officer of technical and practical knowledge and experience at its head; and priority of appropriation shall give the better right. Let us inquire into

the nature and subject of the supervisory power of the board. In the first place, the scheme of state control does not necessarily require the construction or operation, on the part of the public, of irrigating or diverting works; nor is there necessarily involved in that scheme the idea that the state shall become, through its own works, carriers of the water to consumers.

It is evident that it was intended that the supervision by the board should operate upon, and in relation to, individual appropriations and diversions; and hence there was contemplated a control and supervision of the diversion by private appropriators, and a distribution to and between them.

It is equally clear that the supervision comprehends official action, administrative rather than judicial in its fundamental character; although as a necessary incident thereto, as will presently be shown, there is involved quasi judicial authority.

It was argued with much force that the word "supervision" employed in the constitution does not, according ¹⁴² to its most extensive definition, include adjudication; wherefore it was contended a power to act judicially and determine the rights of claimants is not conferred by the constitution. The question, however, is broader than that suggested by such an argument. We are to consider whether all the constitutional authority of the board, applied to the peculiar subject matter within its operation, is of such a nature as to authorize the legislature to confer upon the board jurisdiction to determine the relative rights of the various claimants, as a power necessary to the effectual exercise by the board of its important administrative duties.

It has already been suggested that the supervision of the board affects individual appropriations, and concerns the distribution of water to individual claimants. Any effort to supervise and control the waters of the state, their appropriation and distribution, in the absence of an effective ascertainment of the several priorities of rights, must result in practical failure, in times when official intervention is most required. In fact, that had been demonstrated under our former system.

In the development of the irrigation problem, under the rule of prior appropriation, perplexing questions are continually arising of a technical and practical character. As between an investigation in the courts, and by the board, it would seem that an administrative board, with experience and peculiar knowledge along this particular line, can, in the first instance, solve the questions involved with due regard to pri-

vate and public interests, conduct the requisite investigation, and make the ascertainment of individual rights, with greater facility, at less expense to interested parties, and with a larger degree of satisfaction to all concerned. In the opinion of an able law-writer upon this subject, the powers of the board of control in this respect constitute one of the most praiseworthy features of our legislation. He says: "In the state of Wyoming, at least, there will no longer be the ludicrous spectacle of learned judges solemnly decreeing the right ¹⁴³ to from two to ten times the amount of water flowing in a stream, or in fact amounts so great that the channel of the stream could not possibly carry them, thus practically leaving the questions at stake as unsettled as before": Kinney on Irrigation, sec. 493.

The board is not required to await the occurrence of controversies, but is to proceed on its own motion to ascertain the various rights, conflicting or not, and thereupon see that the water is properly divided. The supervision of the board affects the water of natural streams, the title to which while flowing in its accustomed channels remains in the state or public, and of such a peculiar character that public control is demanded to insure its orderly, economical, and fair distribution.

The determination required to be made by the board is, in our opinion, primarily administrative rather than judicial in character. The proceeding is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right—a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board which, for the state in its sovereign capacity, represents the public, and is charged with the duty of conserving public as well as private interests. The board, it is true, acts judicially, but the power exercised is quasi judicial only, and such as under proper circumstances may appropriately be conferred upon executive officers or boards.

The jurisdiction bears some resemblance to that of the land department of the government concerning the disposal of the public lands. That department is not regarded as a court, or as a branch of the judicial department; nor is its jurisdiction upheld upon the basis of any authority residing in Congress to establish courts. It is considered as an administrative department, and its powers are held to be quasi ju-

dicial only: *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. Rep. 635.

There exists the same partial resemblance to the state board of land commissioners of our own state: *State* ¹⁴⁴ *v. Board of Land Commrs.*, 7 Wyo. 478, 53 Pac. 292.

We are not persuaded that the act is void as conferring judicial power upon the board in violation of the constitution.

That the board was expected to exercise quasi judicial functions is apparent from that provision of section 2 of article 8 of the constitution requiring its decisions to be subject to review by the courts. An examination of the proceedings and debates of the constitutional convention convincingly discloses that the precise method and system adopted by the statute was within the purpose of the convention.

The committee on irrigation, in reporting the provisions upon the subject of water, its use and control, had before it and caused to be read to the convention a paper prepared by the territorial engineer showing the evils of the system of regulation then existing, and suggesting certain principles to be embodied in the constitution, and to control future legislation. The representative of the committee on the floor of the convention stated that the system reported by the committee was the opposite of the one then in force; and that the elemental error in the former system consisted in submitting to the courts a matter about which they had little official or practical knowledge. The paper of the engineer enlarged upon the same proposition, and outlined a method of public supervision including a determination of rights practically the same followed by the existing statute. The president of the convention, a lawyer of much ability and experience, said in the course of the discussion, "Leave it to the board of control to say what equities enter into this matter of the use of water, and let them consider every question that arises in connection with its appropriation, and then say, under all the equities of the case, who shall be entitled to the use of that water." And again, "When we appoint a board of control to manage this water system that we say belongs to this state, let us give ¹⁴⁵ them authority to control it for the highest and best uses of the people of the state": *Constitutional Debates*, 503.

The third reserved question inquires whether claimants whose rights had accrued anterior to the constitution and the enactment of the present statute are required to submit proofs

of their rights in the adjudication proceedings; and the fourth question relates to the effect of a failure on the part of such a claimant to submit his proofs.

It follows from what has already been said that in this regard there exists no difference between claimants whose rights accrued prior and those acquiring rights after the adoption of the constitution and the statute in question. The statute itself, in that respect, makes no distinction between claimants. The same duty to submit proofs is imposed alike upon all who claim a right to the use of water by priority of appropriation.

It is certainly a mistaken notion that the legislature is powerless to require an owner of a property right, however long that ownership may have subsisted, to submit his claims to a legal tribunal, in an authorized proceeding, upon due and proper notice for determination as between him and others claiming interests in the same subject matter. When the subject of the right is water, and the right is confined to its use, the water itself belonging to the public which assumes to control its appropriation and distribution, the legislature may, undoubtedly, require all parties to submit their claims for determination, that the evidence of the right may consist in the decision of a legally constituted tribunal, instead of the assertion of the individual consumer, so far as the public records are concerned, and that the interests of the public and all interested parties may be protected.

With any jurisdiction to determine the rights of claimants to the use of the public waters, the board would be greatly hampered in its supervision if the jurisdiction did not extend to and cover all claims independently of the date of their inception. The supervisory power of the board unquestionably embraces all public waters as well ¹⁴⁶ as all appropriations thereof, and the distribution and diversion of all such waters. The legislative power of regulation must be, and is, equally as comprehensive. If, as necessary to the complete and ample supervision of the matters within the operation of the board's authority, a power of adjudication is essential, appropriate, and valid, such a power, conferred without restriction as to claimants, must be held to be coextensive with the supervisory control of which it is an incident. We are therefore of the opinion that all claimants are required to appear and submit their proofs.

The effect of a failure upon due notice of any party to do so presents in the present condition of the statute a more intricate question.

It is to be observed that the statute imposes no express penalty upon a claimant in case of his neglect or refusal to give evidence of his appropriation. Neither is there any express limitation, in such cases, upon a further assertion of rights by legal proceedings, or in some manner, if any, authorized by law. Doubtless reasonable penalties may be imposed, or limitations even rigorous in terms placed upon a subsequent assertion of such rights, in the event of a disregard by a party of the reasonable requirement that he appear and submit proof of his claim. It is significant, however, that no such penalty or limitation is contained in the statutory provisions.

It is perhaps true that as an implied penalty a claimant remaining unrepresented in the proceeding and determination may be without standing in a subsequent division of the waters under a decree of adjudication by the water commissioner. But nowhere is it provided that a claimant failing to appear shall be barred or estopped from subsequently maintaining or asserting his claim. Possibly the provision for a rehearing in the proceedings before the board may be susceptible to the construction that one not originally heard may apply for rehearing within the limited period of one year; but even then, should such a one not take advantage of that privilege, no penalty seems to be imposed.

¹⁴⁷ Independent of penalty or limitation, it is clear that the claimant would not be estopped or barred unless upon the principle of *res judicata*. It may be assumed that, in the absence of fraud or collusion, any matter actually and legally determined by the final decree of the board becomes *res judicata*, at least as to the public and the parties participating in the proceedings: See *Louden Irr. Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535; *Boulder and Weld County Ditch Co. v. Lower Boulder Ditch Co.*, 22 Colo. 115, 43 Pac. 540; *Colorado etc. Elevator Co. v. Larimer etc. Irr. Co.*, 26 Colo. 47, 56 Pac. 185.

We are led to inquire, therefore, in this connection, whether the rights attempted to be enforced by the plaintiff entered into the determination of the board and thereby became finally disposed of under the operation of the doctrine of *res judicata*; and generally whether an adjudication of the board

which allots no water to an existing nonappearing and non-participating claimant amounts to a determination and disposition of his rights. We are disposed, in deciding the reserved question, to confine its scope to the facts shown by the pleadings in the pending case. It is only upon those facts that the question arises, and in so far only as it relates to those facts need it or ought it to be decided.

Although the answer herein avers that by the decree of the board of control no amount of water was awarded the plaintiff, it is not alleged that the latter's rights, now set up, were considered. And we assume that they were not considered, but were entirely omitted from the board's determination. That seems to be the effect of the pleadings. It may not be improper to say that it is our understanding that under the practice adopted by the board, it eliminates from its consideration and decrees the appropriations of claimants neglecting to come in and submit proofs.

In an earlier part of this opinion we had occasion to allude to some of the particulars wherein the statutory proceeding differs from an ordinary suit in the courts. Affirmative relief in favor of one party as against another ¹⁴⁸ is not its object. Adversary pleadings, as they are commonly employed and understood, are not involved. Indeed, in the strict sense, except in case of contest, it is doubtful if the various claimants can be regarded as adversaries. In many instances they are not adversary in fact. In the very nature of a priority of right to the use of flowing water an appropriator is unable to identify specific water to which he is entitled, unless, indeed, his appropriation extends to all the water of the stream. Hence it is possible that a number of appropriators with diverse interests may be respectively entitled to the use of a portion of the water of the same stream, without having a conflict occur in the exercise of their several rights, owing to the volume of water in their common source of supply, or other natural conditions.

So in Arizona it was held that when there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water to start the statute of limitations running; that it is only in times of scarcity when all parties cannot be supplied, and one appropriator takes water which by priority belongs to another, that there is an adverse use: *Egan v. Estrada* (Ariz.), 56 Pac. 721.

The proceeding before the board is not a part of the process by which an individual appropriation is completed, for that occurs upon a lawful diversion of water open to appropriation and its application to a beneficial use. But the proceeding is instituted by the board, in an official capacity representing the public, for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective state control of the public waters.

A part of the object also is public recognition of an appropriation previously made, and the issuance of documentary evidence of title.

It does not necessarily follow from the establishment of the priorities of certain appropriators that there are no others entitled to divert water from the same stream. ¹⁴⁹ The awarding of definite amounts of water to one or more claimants does not ipso facto amount to a denial of the rights of others, nor depend upon a negation of such rights. In the final determination of the board it may be decreed that a certain claimant did duly appropriate at a certain time a specified amount of water for a certain purpose, without considering at all whether there are prior or subsequent appropriations also. It is, therefore, manifest that a determination of the rights and priorities of several claimants does not necessarily involve the denial of all rights or claims of every other person not mentioned. If the proceeding was one wherein the parties represented in the decree were seeking to quiet their respective titles as against every other person, the result might be altogether different. Then, indeed, a party duly summoned and failing to appear might well be held concluded.

It is true that the certificates issued upon the decree number each appropriation according to its proper order. While this furnishes a convenient mode of reference, we do not deem the provision sufficient of itself to bar a nonparticipant from subsequently asserting his claims, nor as conclusively indicating a purpose to forever estop him from doing so. The number assigned to each established priority must be regarded as having relation, naturally, only to those included in the enumeration, and as between them as defining their relative status respectively.

Hence, on the ground alone that, while several priorities were established, no amount of water was awarded to a par-

ticular existing claimant who did not participate in the proceedings, by appearance, submission of proofs, or otherwise, we are unable to say that the decree of the board is *res judicata* as to him and his rights.

We are therefore constrained to hold that an existing claimant is not concluded as to his water right by a determination of the board of control in adjudication proceedings under the statute wherein they have not been considered, and by a decree which is perforce silent respecting them.

¹⁵⁰ It is probably true that public and private interests will be more securely preserved by a determination in a single proceeding of the right and priorities of every existing claimant; and a law so framed as to effectuate that object, and render the decree conclusive of every accrued claim, would doubtless subserve a useful and salutary purpose. That matter, however, is for legislative cognizance.

The district court is, by the constitution, vested with original jurisdiction both at law and in equity. The jurisdiction of equity to entertain suits for quieting title to the use of water is well settled. The legislature has not attempted to divest the courts of that jurisdiction, and we do not think it could successfully do so. Although in the statutory proceeding for the determination of water rights, the courts obtain jurisdiction only by way of appeal from the decisions of the board of control, all the ordinary remedies known to the law pertinent to the use and appropriation of water are open to all interested in such rights, equally with all other persons in respect to any other kind of right or property. The courts possess ample jurisdiction to redress grievances growing out of conflicting interests in the use of the public waters, and to afford appropriate relief in such cases. Nothing can be plainer, it seems to us, than that in the absence of a previous determination by the board, or in the courts, of the priorities or rights of claimants upon a particular stream, an interested party may resort to the courts to obtain such relief as he may show himself to be entitled to. The jurisdiction of the courts remains as ample and complete after, as well as before, an adjudication by the board. But the principle applies here as in other cases, that a party may not relitigate a question which has passed into final adjudication. And the courts will not assume, in an independent action, to determine anew the rights of parties, which, as between them-

selves, have been settled by the decree of the board of control, at least in the absence of fraud, or a showing of facts sufficient to vitiate a judgment.

¹⁵¹ Under the statutes now in force, there being no provision expressly barring or estopping a claimant failing to participate in the adjudication proceedings, and the decree not being *res judicata* of the undetermined rights of such a claimant, he is at liberty to assert and maintain those rights in the courts through the regular medium of some form of procedure recognized by the law, for the redress of grievances, or the granting of appropriate relief.

The fifth reserved question inquires whether the provision of the statute for publication of notice, and notice by mail constitutes due process of law. The phrase found in the question "and without actual citation or service of summons" is not happily employed. It assumes before it is decided that the service by mail is not actual citation and service.

It is contended that the notice provided for does not amount to due process of law. A discussion of the question whether the proceeding is one in *rem* or not might be interesting. In our view it would seem to partake more largely of the nature of a proceeding in *rem* than of one in *personam*. But we deem it sufficient to say that, in our opinion, it is of such a character and affects a species of rights, which would authorize a notice such as is provided for by publication, coupled with a service thereof upon known claimants. The only question, therefore, which we care to discuss at all, is whether the notice by mail will satisfy the constitutional requirements as to due process of law. In Massachusetts it has recently been held that a notice sent by mail as required by law is sufficient. We cannot do better than adopt a portion of the language of the opinion of that able court in the case referred to. In delivering the opinion of the court upholding an act providing for the registration of land titles—containing the provisions known as the Torrens system—Mr. Chief Justice Holmes said: "As to claimants living within the state, and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice ¹⁵² of suit by a messenger and sending it by the postoffice, besides publishing in a newspaper, recording in the registry, and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal ac-

tion, shall be served by an officer, or that the copy served shall be officially attested."

"Apart from local practice it may be served by any indifferent person. It may be served on residents by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seems to us within the power of the legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice, when other means of notifying the party, like publishing and posting, also are required": *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812. See, also, *Town of Hinckley v. Kettle River R. R. Co.*, 70 Minn. 105, 72 N. W. 835.

Now our statute requires the notice to be sent by registered mail, thus insuring more certainly its reaching the proper party, and as well, in most instances, securing personal delivery, and in all cases the return of a card indicating its receipt.

We can perceive no reasonable objection to that manner of sending notice to known claimants in the character of proceeding we are considering, at least where publication is also required.

Agreeable to the custom established in the consideration of reserved questions, we do not think it necessary to answer the sixth question, which asks whether the answer is sufficient to constitute a defense to the suit of plaintiff. That must be decided by the district court upon the principles herein laid down, so far as it is affected by the other reserved questions.

We believe it to be unnecessary to attempt to return a categorical and specific answer to each of the reserved questions. We apprehend that our views concerning them have been set forth in the course of the opinion with sufficient distinctness, and that nothing further is required ¹⁵³ to indicate our decision upon the questions and the reasons therefor.

Corn and Knight, JJ., concur.

An Appropriation of Water can be made only by an actual diversion, followed by an application thereof within a reasonable time to some beneficial use: *Cache La Poudre Co. v. Water etc. Co.*, 25 Colo. 161, 71 Am. St. Rep. 131, 53 Pac. 331; *Moyer v. Preston*, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845; *Hague v. Nephi Irr. Co.*, 16 Utah. 421, 67 Am. St. Rep. 624, 52 Pac. 765. See the discussion of what amounts to an appropriation of water in the monographic note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 799-

817. The right to appropriate water applies only to the public lands: *Benton v. Johncox*, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495; *Smith v. Denniff*, 24 Mont. 20, 81 Am. St. Rep. 408, 60 Pac. 398.

Priority of Appropriation of Water in point of time gives superiority of right among appropriators for like beneficial purposes: *Strickler v. Colorado Springs*, 16 Colo. 61, 25 Am. St. Rep. 245, 26 Pac. 313. See the monographic note to *Heath v. Williams*, 43 Am. Dec. 269-283, on the rights acquired by appropriation of water.

The Unappropriated Waters in the streams of Colorado are dedicated by the constitution to the use of the people, the ownership being in the public: *Wheeler v. Northern etc. Irr. Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487. The water of every natural stream in that state is the property of the public. Private ownership is not recognized, though the right to divert water and apply it to beneficial uses is guaranteed by the constitution: *Fort Morgan etc. Co. v. South Platte Ditch Co.*, 18 Colo. 1, 36 Am. St. Rep. 259, 30 Pac. 1032.

The Titles to Statutes and their sufficiency within the various constitutional requirements are considered in the monographic notes to *Bobel v. People*, 64 Am. St. Rep. 70-107; *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486; *Lewis v. Dunne*, 86 Am. St. Rep. 267-279.

Statutes are Presumed Constitutional: *Alabama etc. R. R. Co. v. Reed*, 124 Ala. 253, 82 Am. St. Rep. 166, 27 South. 19; *Austin v. State*, 101 Tenn. 563, 70 Am. St. Rep. 703, 48 S. W. 305. If the proper construction of a statute is doubtful, courts must resolve the doubt in favor of the validity of the law: *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851; *Overshiner v. State*, 156 Ind. 187, 83 Am. St. Rep. 187, 59 N. E. 468.

STATE v. WILLINGHAM.

[9 Wyo. 290, 62 Pac. 797.]

MUNICIPAL CORPORATIONS — ORDINANCES—LICENSE —INTERSTATE COMMERCE.—A municipal ordinance requiring any person selling goods, wares, or merchandise to take out a license therefor, unless he is a merchant paying an annual tax upon his goods, or a traveling agent selling exclusively by sample, or otherwise, to regular merchants, is void, as in conflict with interstate commerce as against an agent of a manufacturer in another state engaged in delivering the goods of the manufacturer and collecting the price upon orders solicited to persons not regular merchants. (p. 950.)

MUNICIPAL CORPORATIONS — ORDINANCES—LICENSE —TAXATION.—A municipal ordinance requiring any person selling goods, wares, or merchandise to procure a license therefor, unless he is a merchant paying an annual tax therefor, or a traveling agent, selling exclusively by sample, or otherwise, to regular merchants, is not void as being in conflict with a constitutional provision that all taxation shall be equal and uniform. (p. 951.)

INTERSTATE COMMERCE—MUNICIPAL LICENSE TAX. If a company is engaged in manufacturing goods in one state and

through its agent solicits orders in another state, from persons not regular merchants, upon which it transports the goods consigned to itself into the latter state, and they are there delivered by such agent, who collects the price, the goods are the subject of interstate commerce, and the agent is not subject to arrest for violating a municipal ordinance prohibiting him from selling goods to persons not regular merchants without first obtaining a license therefor. (p. 952.)

Conviction under an ordinance providing as follows: "Section 1. That any person or persons, company, or corporation, who shall, directly or indirectly, keep a store, or sell, vend, or retail any goods, wares, or merchandise, without being first duly authorized by a license, as hereinafter provided, the person or persons, company, or corporation, so offending, shall be fined in any sum not less than fifty dollars, nor more than one hundred dollars; provided, this ordinance shall not be construed to apply to the sale of goods, wares, or merchandise, by merchants or other persons, who pay an annual tax upon such goods, wares or merchandise, assessed according to the revenue laws of this city; provided, further, that this ordinance shall not apply to traveling agents, who sell exclusively by sample or otherwise, to regular merchants doing business in this city. Sec. 2. That from and after the passage and approval of this ordinance any person or persons, company, or corporations, not paying an annual tax as hereinbefore provided, shall pay a license of twenty-five dollars per month; provided, that no license shall be issued for less time than one month." The Chicago Portrait Company, engaged in making pictures and picture frames in Chicago, solicited orders through its agent in Cheyenne, Wyoming, and shipped the goods consigned to itself at the latter place, where they were delivered by such agent and the price collected by him from persons who were not regular merchants. The agent was arrested for violating the above ordinance and after his conviction appealed.

W. R. Stoll, for the appellant.

293 CORN, J. There are two principal questions presented in this case: 1. Whether the ordinance is void because in violation of the interstate commerce clause of the constitution of the United States; and 2. Whether it is void as in violation of the provision of section 28, article 1 of our state constitution that "all taxation shall be equal and uniform."

The principles which control the decision of the first question, with the authorities, were set out in a very clear and

well-considered opinion by Chief Justice Groesbeck in the case of *Clements v. Town of Casper*, 4 Wyo. 495, 35 Pac. 472. We do not deem it necessary to rehearse the reasoning of the court in that case. But since that decision was rendered the supreme court of the United States have again passed upon the question in a case where the facts were almost identical with those in the one before us: *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. Rep. 829. In that case a maker of portraits and picture frames in Chicago had sent his agent into the state of Pennsylvania to solicit orders for pictures and picture frames by going personally to citizens and residents of that state. Upon receiving orders for pictures and frames the agent forwarded such orders to the manufacturer in Chicago, where the goods were made and shipped by him to the purchasers in Titusville, by railroad freight or express, the express companies or the manufacturer's agents collecting the price of the goods and forwarding the amounts to him at Chicago. The ordinance of the city of Titusville required that persons so employed in canvassing or soliciting in the city should procure a license from the mayor, paying therefor certain sums fixed by the ordinance, but providing that its provisions should not apply to persons selling by samples to manufacturers or licensed merchants or dealers residing and doing business in said city. After ²⁹⁴ examining the authorities the court decided that it must be held that the license tax imposed upon the defendant was a direct burden upon interstate commerce, and was, therefore, beyond the power of the state. Those decisions are controlling in this case, and the ordinance in question must be held to be void as in conflict with the interstate commerce clause of the constitution.

The second proposition, that the ordinance is void because in conflict with the provision of the constitution of this state requiring that "all taxation shall be equal and uniform," stands upon entirely different ground.

The sovereignty may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction; or, on the other hand, it may select any particular species of property, and tax that only, if in the opinion of the legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no re-

striction on the power of choice unless one is imposed by constitution: Cooley on Taxation, 570. In a number of the states it has been held that the constitutional requirement of equality and uniformity does not apply at all to the taxation of occupations, owing to the fact that the taxation of all occupations equally would work the greatest possible injustice and is impossible in practice. But, if applicable at all, it does not deprive the legislature of the power of dividing the objects of taxation into classes. It merely obliges the legislature to impose an equal burden upon all those who find themselves in the same class: State v. Lathrop, 10 La. Ann. 402. To be uniform, taxation need not be universal. Certain objects may be made its subject, and others may be exempted from its operation; certain occupations may be taxed and others not; so some occupations may be taxed for a greater amount and others for a less, but as between the subjects of taxation in the same class ²⁹⁵ there must be an equality: State v. Poydras, 9 La. Ann. 168. As said in a Virginia case: "The requisitions of the constitution may be carried out by a uniform tax on licenses to persons following the same pursuit under the same conditions and circumstances; a difference therein will justify a discrimination in the tax": Slaughter v. Commonwealth, 13 Gratt. 776; Ex parte Miranda, 73 Cal. 373, 14 Pac. 888; Cooley on Taxation, 2d ed., 169.

Tested by these rules, we are unable to perceive that the ordinance conflicts with the clause of the constitution in question. There is nothing unequal in classifying differently merchants who pay an annual tax upon their stocks of goods under the revenue laws of the city and those who pay no such tax. But, upon the contrary, it seems to be an attempt to secure entire equality as nearly as may be by requiring each class to contribute its proportion to the fund necessary to defray the expenses of the city government. Nor is there anything unreasonable or unequal in exempting from this tax the traveling salesmen, who supply the regular merchants in whole or in part with their stock of goods upon which they pay taxes to the city. The distinctions between the two classes are apparent. The latter are, in a sense, the assistants and purveyors of the regular merchants; the goods sold by them pass at once into the stocks of the merchants to be assessed for taxation, and any license fee required of them would operate in a measure as a double tax upon the merchants who buy from them, while the goods sold by the other

class become at once the personal belongings of their customers and inevitably, in a great measure, escape taxation.

The foregoing is a sufficient answer to all of the voluminous questions presented for the consideration of the court, except the ninth and tenth, which may require a separate consideration. The substance of them is, Did the goods under the circumstances become a part of the general mass of property of this state upon their shipment to Cheyenne, and not the subject of interstate commerce, ²⁹⁶ and did the delivery of them by the agent constitute a sale?

The general rule is that, in the absence of special authority to bind his principal, the drummer can merely solicit and transmit the order, and the contract of sale does not become complete until the order is accepted by his principal. Up to that time the order is a mere proposal, and the place of the contract is where the proposal is accepted: *Gill v. Kaufman*, 16 Kan. 571; *Burbank v. McDuffee*, 65 Mo. 135; *McKindly v. Dunham*, 55 Wis. 515, 42 Am. Rep. 740, 13 N. W. 485. From the statement of facts in this case, it appears that the portraits and frames were manufactured in compliance with the order, and shipped to Cheyenne for the purpose of being delivered to the persons ordering. This was an acceptance of the order, and it was an Illinois contract. The delivery of the articles to the persons ordering did not constitute a sale by the agent making the delivery, but the manufacture, shipment, and delivery of the goods were simply steps taken by the Chicago company in the performance of its contract. The shipment of them by the company to itself at Cheyenne had no greater significance than if they had been sent by the company from one of its warehouses to another in the city of Chicago. They were still the subject of interstate commerce, and the arrest of the agent was not authorized by law.

Potter, C. J., and Knight, J., concur.

Interstate Commerce.—A municipal ordinance imposing a license tax upon a resident of the state who solicits orders for the sale of goods by sample, solely for a nonresident owner, and who forwards such orders and receives a commission on sales made, imposes a direct burden upon interstate commerce: *Adkins v. Richmond*, 98 Va. 91, 81 Am. St. Rep. 702, 34 S. E. 967. Compare *Croy v. Obion County*, 104 Tenn. 525, 78 Am. St. Rep. 931, 58 S. W. 235; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165. A statute levying a tax on the business of selling lightning-rods made in one state and sold in another upon orders taken by a traveling salesman, is a tax upon interstate commerce: *Talbutt v. State*, 39

Tex. Cr. Rep. 64, 73 Am. St. Rep. 903, 44 S. W. 1091. And an ordinance requiring an agent for a wholesale book house situated in another state to take out a license, and pay a license fee when soliciting orders within the state, is an attempted regulation of commerce between the states: *Bloomington v. Bourland*, 137 Ill. 534, 31 Am. St. Rep. 382, 27 N. E. 692. See, further, the monographic note to *People v. Wemple*, 27 Am. St. Rep. 561-564.

COAD v. COWHICK.

[9 Wyo. 316, 63 Pac. 584.]

JUDGMENTS—LIEN ON AFTER-ACQUIRED LANDS.—A judgment is a lien upon the after-acquired lands of the debtor under a statute providing that "lands and tenements within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered, but judgments by confession and judgments rendered at the same term at which the action is commenced shall bind such lands only from the day on which such judgments are rendered, and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution." (p. 954.)

STATUTES ADOPTED FROM ANOTHER STATE—BINDING EFFECT OF CONSTRUCTION OF—JUDGMENT LIENS.—Although a statute of one state is adopted in another state, the courts of the latter state are not bound by the construction placed upon the statute in the former state, if such statute is not peculiar to that state alone and other states have adopted it, and their courts have placed a different construction upon it. The rule is here applied as to the effect of a judgment as a lien on after-acquired lands. (pp. 956, 957.)

Burke & Fowler and J. W. Lacey, for the appellant.

Clark & Breckons, for the appellees.

320 CORN, J. The sole question submitted in this case is whether, in this state, a judgment of the district court is a lien upon after-acquired lands. Our statute upon the subject is as follows:

"Sec. 3828. Lands and tenements, including vested interests therein, and permanent leasehold estates, renewable forever, and goods and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution, and sold as hereinafter provided.

"Sec. 3829. Such lands and tenements, within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered; but judgments by confession, and judgment rendered at the same term at which the action is commenced,

shall bind such lands only from the day on which such judgments are rendered; and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution."

At common law, except for debts due the king, the lands of the debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. But by the statute (Westminster, 2; 13 Edward I), the judgment creditor was given his election to sue out a writ of fieri facias against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plow) and a moiety of his lands until the debt should be levied by a reasonable price and extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the ³²¹ writ was denominated an *elegit*: *Hutcheson v. Grubbs*, 80 Va. 254. While this statute did not in direct terms create the lien, courts so construed it as to infer a lien from the power to take the lands in execution: *Scriba v. Deane*, 1 Brock. 170, Fed. Cas. No. 12,559. And this lien has been held by the English courts and by the almost unanimous opinion of the courts of this country to extend to the after-acquired lands of the debtor. Most of the states have enacted statutes declaring the lien, and almost without exception, and without regard to whether such statute in terms extended the lien to after-acquired lands, they have held that such lands were bound by the judgment from the time of their acquisition by the debtor: *Freeman on Judgments*, 367. So far as I can find, the only two exceptions are Pennsylvania and Ohio. There was also a similar holding in Iowa: *Harrington v. Sharp*, 1 G. Greene, 131, 48 Am. Dec. 365. But the rule laid down in that case was subsequently changed by an amendment to the statute expressly providing that judgments should be a lien upon after-acquired lands, thus bringing it into line with the mass of opinion in this country: *Ware v. Delahaye*, 95 Iowa, 682, 64 N. W. 640. The Mississippi court is also cited as adopting the same construction. But an examination of the cases shows that that court simply rejected the contention that lands subsequently acquired were bound from the date of the judgment, and held that "the lien attached on after-acquired property from the time it was acquired by the debtor": *Moody v. Harper*, 25 Miss. 492; *Cayce v. Stovall*, 50 Miss. 402.

But it is contended that our legislature having adopted the language of the Ohio statute, we are bound by the construction given to it by the Ohio courts. The case of *Roads v. Symmes*, 1 Ohio, 314, 13 Am. Dec. 621, which settled the law in that state, is not a construction of the statute under consideration, but is an exposition of the rule at the common law or under the statute of Westminster 2. The court deem it unnecessary to decide whether it was a maxim of the common law or was first introduced by the statute of ³²² Westminster 2, as they say both are equally the law in Ohio. And the decision is expressly based upon the reasoning in the Pennsylvania case of *Calhoun v. Snider*, 6 Binn. 145. But the decision in the Pennsylvania case is not based upon the common law nor the statute of Westminster 2. The author of *Freeman on Judgments* says of that decision: "As long ago as the year 1813, in the case of *Calhoun v. Snider*, 6 Binn. 145, the judges in Pennsylvania, in deference to a long course of decisions in that state, were constrained to decide that no judgment could ever attach as a lien upon lands in which the judgment debtor had no interest at the date of its rendition. The judge delivering this opinion at the same time said: "I am well satisfied that by the English common law lands purchased by the defendant after judgment, but aliened before execution, were bound by the lien." Forty-seven years later it was said in the same state that, "whatever may be thought of the doctrine of *Calhoun v. Snider*, 6 Binn. 145, that a judgment lien does not bind after-acquired real estate, it is too firmly established in the jurisprudence of this state to be shaken at this day": *Waters' Appeal*, 35 Pa. St. 523, 78 Am. Dec. 354. The rule thus established in Pennsylvania, and confessedly repugnant to the common law, was adopted in a few other American cases. It is, nevertheless, clearly repudiated, in favor of the common-law rule, by the vast majority of the American decisions declaring judgments to be liens upon real property acquired by the defendant, after their rendition: *Freeman on Judgments*, sec. 367. The Ohio court in 1829, in *Stiles v. Murphy*, 4 Ohio, 92, reaffirmed the doctrine as laid down in *Roads v. Symmes*, 1 Ohio, 314, 13 Am. Dec. 621. But while they construe the statute then in force in that state, they base their decision upon *Roads v. Symmes*, 1 Ohio, 314, 13 Am. Dec. 621, and they say in conclusion: "That decision may have been an innovation upon established principles of law—it may have been a departure from true

policy, under the circumstances in which we are placed—but it would be a more dangerous innovation, and a wider departure from true policy, now to disturb it.” The ³²³ language of the statute as quoted in *Stiles v. Murphy*, 4 Ohio, 92, is “the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which judgment shall be rendered,” and, it will be observed, is not in terms the same as the one subsequently in force in that state and adopted by the legislature of Wyoming.

We fully concede that the rule relied upon, that in adopting the statute of another state we also adopt the construction which it has received, is one of great importance and very generally applied; but it is based upon a specific and sufficient reason, which is, that the legislature are presumed to have known the construction which the words of the statute have received, and if they had intended any other construction, they would have used apt words to express the change. But this statute is not peculiar to the state of Ohio. Other states have the same provision, using either the identical words, or language which is in substance the same. And they have, almost without exception, given to the language a different construction. Must it not also be presumed that the legislature knew the construction given to it generally by the courts of this country and England? The adoption of the identical words of the Ohio statute is not specially significant in view of the fact that they are but a part of our Code of Civil Procedure, covering more than two hundred pages of our Revised Statutes, and adopted bodily, almost without change, from the code of Ohio.

This construction has from time to time been urged upon the courts of other states, but with practical unanimity they have declined to adopt it. The language of the Kansas statute was: “Judgments shall be liens on the real estate of the debtor within the county in which the judgment is rendered; but judgments by confession and judgments rendered at the same term during which the action was commenced shall bind such lands only from the day on which judgment was rendered.” *Brewer, J.*, in delivering the opinion of the court, says: ³²⁴ “Counsel for plaintiff in error contend that our statute resembles the Ohio statute, and that, therefore, adopting it, we adopt the construction given there. Our statute is not a copy of the Ohio statute; and, while it resembles it

very closely, yet little, if any, more so than it does the statutes of some of the other states, as, for instance, Tennessee. Nor do we understand the Ohio court, in the case in 1 Ohio, in which the question was first decided, as resting their decision upon the peculiar language of their statute. It should, perhaps, be stated that the statute now in force in Ohio, and from which it is claimed ours was taken, is not exactly like the one in force at the time of the decisions quoted." And the Kansas court held that the lien did bind after-acquired lands: *Babcock v. Jones*, 15 Kan. 296. In Nebraska, the statute was in the words of the Ohio statute, they, like ourselves, having adopted the Ohio code of procedure. The supreme court of that state had stated, in *Filley v. Duncan*, 1 Neb. 134, 93 Am. Dec. 337, that the lien of a judgment did not attach to lands acquired after its rendition, so as to affect bona fide purchasers. But upon the question being presented to the court, in *Colt v. Dubois*, 7 Neb. 392, they disregard the dictum in *Filley v. Duncan*, 1 Neb. 134, 93 Am. Dec. 337, and hold that the lien attaches to after-acquired lands. The question again came before that court in *Berkley v. Lamb*, 8 Neb. 392, 1 N. W. 320, and the adoption of the Ohio view was insisted upon. One of the justices, in a separate opinion, not only maintained that the Ohio decision was binding upon the Nebraska court, but that such was the proper construction of the language of the statute itself, contending that as lands not then owned by the judgment debtor could not be affected by the lien on the first day of the term at which the judgment was rendered, the expression, "all other lands," must include lands not then owned by the debtor. But the Nebraska court has adhered to the rule as stated in *Colt v. Dubois*, 7 Neb. 392: *Duell v. Potter*, 51 Neb. 241, 70 N. W. 932. And the true construction of the language of the statute seems to be found in the fact that the judgments of the English ³²⁵ courts of general jurisdiction were liens upon the lands of the debtor throughout the kingdom, whether owned at the time or afterward acquired. The object of the American statutes was to limit the lien to lands within the county where the court was held, land without the county to be bound only from the time they are seized in execution. That this is the meaning of our statute is still more apparent from the language of the succeeding section (3830), establishing the lien of judgments of the supreme court: "A judgment of the supreme court,

for money, shall bind the lands and tenements of the debtor, within the county in which the suit originated, from the first day of the term at which judgment is entered, and all other land, and the goods and chattels of the debtor, from the time they are seized in execution." Here the distinction is very clearly drawn between lands within the county, and all other lands; and it would be a violent assumption to suppose that the general purpose of the two sections is not the same.

The decisions in Pennsylvania and Ohio, as before observed, are substantially conceded by the courts of those states to have been erroneous, and are only adhered to under the rule of *stare decisis*. That rule is not in any measure persuasive with us, the question not having been passed upon before by this court, and no such rule of property having been established in this state. Most of the states have enactments similar to our own, to which they have given a construction extending the lien to after-acquired lands, and this was the prevailing construction long prior to the adoption of the statute by us.

Our conclusion is, therefore, that, having adopted the statute of Westminster 2 into the legislation of this state, we adopted the construction given to it with substantial unanimity by the courts of England and this country, that the lien of the judgment attaches to the after-acquired lands of the debtor. And that our enactment upon the subject was framed for the purpose of adapting that statute to our conditions by defining the territorial ³²⁶ limits of the lien existing by force of it, and not to change the character or extent of the lien in any other respect.

Potter, C. J., and Knight, J., concur.

Judgments are Generally Regarded as binding by lien realty acquired by the judgment debtor after the docketing of the judgments: See the monographic note to *Filley v. Duncan*, 93 Am. Dec. 357.

A Statute Adopted from England^{*} or from a sister state is presumed to have been adopted with the construction theretofore given it by the courts of that country or state: *Doswell v. Buchanan*, 3 Leigh. 365, 23 Am. Dec. 280; *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582; *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17, 37 Pac. 639; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. 628. For qualifications of this rule, see *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639, 52 Pac. 372; *Pratt v. Miller*, 109 Mo. 78, 32 Am. St. Rep. 656, 18 S. W. 965; *Myers v. McGavock*, 39 Neb. 343, 42 Am. St. Rep. 627, 58 N. W. 522.

KELLEY v. RHOADS.

[9 Wyo. 352, 63 Pac. 935.]

TAXATION OF MIGRATORY LIVESTOCK.—Whether the purpose of an owner of livestock in bringing it into, and driving it through, the state is that it may graze there, and while in transit receive the benefits from grazing, the same as if kept in the state from which it came, and thus attain a situs in the state of transit for the purpose of taxation, or whether the purpose is merely to drive the stock through the state in transit to a market, depends upon the course taken, the method of travel, the time consumed, and the width of territory covered. (p. 963.)

TAXATION OF MIGRATORY LIVESTOCK.—If the principal purpose of an owner of livestock in bringing it into, and driving it through, the state to another market is to graze it, and it is maintained by grazing while it is being driven through the state, it is subject to state taxation without any interference with interstate commerce. (p. 965.)

TAXATION OF MIGRATORY LIVESTOCK.—If livestock is brought into the state for the purpose of driving it through the state to another market, and it is held and allowed to graze for any other purpose than of terminating the transit within a reasonable time, it becomes liable to state taxation. (p. 966.)

Van Orsdel & Burdick, for the appellant.

H. W. Moore, for the appellee.

354 POTTER, C. J. The sole question in this case is whether certain sheep of plaintiff in error had obtained a situs in this state for the purposes of taxation.

On October 29, 1895, the defendant in error, as assessor for the county of Laramie, collected from plaintiff in error the sum of two hundred and fifty dollars as taxes upon a herd of sheep, consisting of about ten thousand head, belonging to the plaintiff in error, and then in the county of Laramie, in this state. Alleging the tax to have been illegally collected, plaintiff in error brought this suit in the district court to recover the amount so collected from him. The tax complained of was assessed and collected by authority of the provisions of chapter 61 of the Laws of 1895. That act is set out in full in our opinion in this case when the same was before us on reserved questions, and its validity upheld: *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904, 51 Pac. 593.

The cause was submitted to the district court upon an agreed statement of facts. Judgment was rendered for defendant, and plaintiff now brings the case here on error, assigning as error that the judgment is not sustained by the evidence, and is contrary to law. The contention of the plain-

tiff in error is that the property taxed was the subject of interstate commerce, being in transit across the state from Utah to Nebraska, and, as such, was not taxable under the laws of this state. It is insisted that the facts show that the sheep were not brought into this state to be grazed, but were merely in transit on hoof through the state, and that their maintenance by grazing, ³⁵⁵ while so engaged, was but an incident of their transportation.

When the case was here before, conceiving that the question whether or not the sheep were brought into the state for the purpose of being grazed was a mixed one of law and fact, we did not decide it, deeming a decision upon a question of fact improper upon reserved questions. We did, however, in our opinion, mention the considerations which should control a determination of the fact, if in controversy, whether in a particular case sheep were brought here for grazing purposes, although in transit through the state.

We then said: "We do not dispute the proposition that an owner of livestock, if not otherwise disobedient to the law, and if observant of the police regulations of the state, has the right to transport them to market by driving on foot, as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing and feeding them upon the natural grasses which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation. To determine the existence or nonexistence of such a joint purpose all the facts must be considered—the course taken; the character of the territory grazed upon; the time employed; the subsequent method of intended shipment; the ordinary facilities for transportation by other means; the place selected for the commencement of the journey by rail, if that is in contemplation; possibly the time of the year, and the eventual purpose of their shipment; the character of the livestock, and the manner in which said stock is customarily kept, maintained, and grown, and, in general, every competent fact which will tend to explain the purpose in view."

³⁵⁶ The statement of facts, so far as is material to this question, is as follows:

"Plaintiff, at all times mentioned in the petition herein, was the owner of the sheep mentioned in said petition, and that said sheep, on or about the twenty-ninth day of October, A. D. 1895, were in the county of Laramie, in charge of James M. Yeates, the agent of the plaintiff, who was driving and transporting said sheep through the state of Wyoming, from the then territory of Utah, to the state of Nebraska.

"In driving said sheep in such manner, it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while so being driven, the sheep were permitted to graze over land of that width. They were driven in some instances through large pastures, in other instances through the public domain, and in other instances through pastures inclosed by fences. While being driven from the western boundary of the state to Pine Bluffs station, they were maintained by grazing along the route of travel.

"It was a fact, and defendant had knowledge of the fact, and was notified by plaintiff's agent, that said herd of sheep was being driven across the state of Wyoming to Pine Bluffs Station for the purpose of shipment, and that the same were not brought into the state for the purpose of being maintained permanently therein.

"The time consumed in driving said sheep from the western boundary of the state of Wyoming to Pine Bluffs Station, in Laramie county, was from six to eight weeks, and by the route followed the distance traveled was about five hundred miles.

"That for the purpose of shipping said sheep it was not necessary that they should be driven into the state of Wyoming, and that the railroad over which they were shipped could be reached from the point where the sheep were first driven by traveling a less distance than was necessary to travel from the place where they were first driven to any point in the state of Wyoming."

³⁵⁷ As was said in our former opinion, it is well settled that property engaged in interstate commerce by being transported through a state, on its journey from one state to another, would not be liable to taxation in the state through which it is passing; and if the sole purpose of the owner of livestock is to pass through the state on the way to eastern markets, such stock will not have been brought here to be grazed. It is also true that before personal property becomes subject to

state taxation, it must have become identified and incorporated with the general mass of property in the state.

We held that when livestock are brought into the state to graze, they are fully identified and incorporated with the other property of the state; and that if that purpose is present, the length of time the property remains here is immaterial. That, in such case, no question of interstate commerce is involved, which prevents the exercise by the state of its power of taxation. And we said: "We observe no distinction, in respect to the matter under consideration, between the case of a sheep owner of Utah or some other state, driving or bringing his sheep into this state, for the purpose of and permitting them to graze here, and an owner of like property residing in this state who brings in from another state sheep for the same purpose."

Adhering to the views expressed in our previous opinion, we quote further some observations then made respecting this character of property:

"Livestock in this state is, in the greater part, maintained by feeding or grazing upon the natural grasses of the soil. In the case of some kinds of livestock, they are largely allowed to roam at will, but over territory more or less confined in extent. With sheep the custom is to keep them in convenient flocks or herds intrusted to herders, and to direct them from place to place, generally, as to a particular herd, in some certain locality, but covering in most cases a rather large and indeterminate territory. They are thus maintained until in proper condition ³⁵⁸ for disposition, shipment, or other purposes of the owner. The only way in which such property becomes identified and incorporated with the other property of the state is by being turned at large or herded, to be maintained by grazing. Whether the purpose is that they shall remain in the state permanently or not is not a determining factor. Such a purpose does not exist in the case of a greater proportion of all the livestock in the state. The object of a cattle grower is to ship out of the state his cattle, as soon as they arrive at the proper age, size, or condition. To some extent that is also the purpose which the sheep owner has in view.

"We do not understand that an ultimate design to transport sheep out of the state is at all inconsistent with a purpose of bringing them into the state to graze. The time of the contemplated shipment may be uncertain, or it may be extended for

a considerable period into the future. Incidentally, no doubt, that intention should be taken into account, but we do not conceive it to be a conclusive circumstance in determining the situs of the property, or the purpose of its presence within the state.

"It is altogether clear, that in case of herd sheep in this country, they must, according to custom, be maintained somewhere by grazing, until the time fixed upon has arrived for starting them upon their journey to some final destination. It may well be that if it is not desired that they shall reach such destination before a certain time, and that in the meantime the necessity of allowing them to graze and obtain the benefits therefrom is recognized, places therefor may be selected by the owner which will subserve the latter purpose, and at the same time facilitate their final transportation when the occasion therefor shall occur. Such property is migratory; they are almost constantly moving; the character of the natural grasses, and the effect thereon by the grazing of sheep is such that such movement is necessary. They cannot be permitted to remain stationary, and feed in the same place a very long period of time. Therefore it follows that, as they ³⁵⁹ must move, their course can be readily directed along the direction in which they are eventually to be taken. In such a case, the purpose of grazing is not inconsistent with the idea of a driving or transportation to some distant place. Nevertheless, the mere fact that in such driving they are also permitted to graze upon the way will not determine at all hazards the character of the purpose in bringing them into the state. Each case must, it would seem, depend upon its own facts. It will not do to say that in every case, because an owner brings his sheep into the state to drive them through it to some other jurisdiction for purposes of sale or otherwise, that they are therefore merely in transit, for the reason that such a course might be selected which would consume quite a time in getting out of the state, and at the same time the animals would be maintained by grazing the same as if kept in the state from which they came, or if they had originally been within this state; and all the benefits would be derived that would accrue in the absence of any such intended transportation. The sheep would thus be used here in the same and only manner in which during the same time they would be used anywhere. We are of the opinion, therefore, that in determining the purpose and

the situs, the course and method of travel is a proper subject, and one of the elements for consideration."

It is not expressly agreed in this case that the sheep were brought into this state to graze, nor, on the other hand, that they were not here for that purpose. That ultimate fact, then, was to be determined from the other facts and circumstances which were agreed to. The district court, following the rule previously laid down in the case, in holding the property taxable, must have found that a part of the purpose of the owner in bringing his sheep into the state, and transporting them through it, was that they might graze here, and, while in transit, receive the benefits to be derived from the grazing of his animals upon our natural grasses. Is that finding justified ³⁶⁰ by the agreed facts in the case? We are of the opinion that it is, and shall endeavor as briefly as consistent with the importance of the question to state the reasons that influence our conclusion.

The evidence is that the plaintiff "was driving and transporting his sheep through the state of Wyoming from the then territory of Utah to the state of Nebraska," and again, "said herd of sheep was being driven across the state of Wyoming to Pine Bluffs Station for the purpose of shipment." In all this there is nothing conclusively inconsistent with a purpose originally existing to bring the sheep into this state to graze, not as a mere incident of the transit, but as an independent object of their coming into the state on foot, and of their movement. No doubt said independent purpose of grazing was connected with the intention to ultimately ship them by rail out of the state, and to so direct their course of travel while grazing that they would gradually pass through the state, and at a time approximately anticipated reach the contemplated point of shipment.

The fact that it was not intended to maintain them permanently within the state was shown, in our former opinion, not to operate as a determining factor in the case.

The distance traveled by the sheep during a period of six to eight weeks while they were in the state made a daily travel of about nine miles. It may be, as suggested by counsel, that this is the maximum distance which such animals can be safely driven for such a continuous period of time—when the manner in which they were maintained is considered. Nevertheless, we believe it to be also true that sheep will, for that or even a much longer period, travel daily eight or ten miles, and

possibly occasionally a few miles farther than that, and, if allowed to graze, obtain all the sustenance they require.

It is not uncommon for sheep in this region to move in a day, while grazing, five or six miles, in the absence of a definite destination, and although not in transit from ³⁶¹ one place to another. Sometimes, in the case of ordinary grazing of a herd of sheep, they will move a greater distance, and that is not unusual, we believe, if it is found necessary to go farther to reach a supply of water.

In trailing or driving sheep from place to place over a period of time more or less extended, it is not the custom to force them to any particular speed of travel. Those in charge confine their efforts to a mere direction of travel, keeping them headed in the desired direction, but permitting them to go slowly enough to eat of the natural grasses as they proceed. Under competent herders, sheep so driven will easily travel the daily distance covered by the sheep in question, and be well maintained at the same time by grazing along the route of travel when conducted through the public domain and pastures, and over territory such as was traversed by the sheep of plaintiff in their journey through this state.

In such case, then, sheep so traveling, while not brought into competition with other property of the state for the purposes of sale, perhaps, are in daily competition with all the livestock regularly maintained in the localities of the route of travel, in respect to the use of the natural grasses of the soil, incapable of reproduction in the same year. More than that, the effect of the grazing of sheep is such that it is a matter of common knowledge a pasture over which they have been permitted to graze in large bunches, or herds, is rendered unfitted for the grazing of other classes of domestic livestock.

Now the sheep of plaintiff did not follow in the course of their transit any public highway. They roamed over pastures fenced and unfenced, and across the public domain, and were allowed to spread out a quarter of a mile in width. In other words, they were so directed or herded that they might graze.

The same railroad over which they were ultimately shipped could have been reached without coming into Wyoming at all, and that by being driven a less distance than was necessary to drive them to reach any point in ³⁶² this state. This appears from the agreed statement. We know, judicially, that between the western boundary of the state and Pine Bluffs Station, which is situated close to the Nebraska line, there were numer-

ous stations, at any one of which the sheep could, if desired, have been transferred to the railroad for shipment.

It seems impossible to conceive that a part of the plaintiff's purpose was not the grazing of the sheep in this state. Indeed, we are inclined to view the facts as disclosing that purpose to have been the controlling one; and that the method adopted for the movement of the sheep was employed for the reason that the sheep could at the same time be maintained in like manner as if they had been kept in Utah, and perhaps new pastures found, while keeping the owner's home ranges for other sheep, or for another season or time of year.

Counsel for plaintiff in error suggests, indeed, that it is the custom of the trade to first put sheep on "feed lots" for varying periods before offering them for sale in open market, and that as the food used is corn, which is ready for consumption the latter part of October, in the corn-feeding states (of which Nebraska is one), the shipper plans to reach his destination about November 1st, partly on account of the availability of the grain at that time, and partly because driving at a later date would be difficult and hazardous on account of storms. They concede that those purposes could be as well accomplished by holding the sheep at the point of departure until a later date, and then shipping them through quickly by rail. But they state such shipment a longer distance by rail would be much more expensive. The agreed facts are, however, silent as to the difference, if any, in the matter of expense between the two methods.

Adopt the contention of counsel for plaintiff in error, which has been ably presented, and it would be possible for sheep owners to keep their large herds moving from one state to another, and thus avoid taxation altogether; and such, in many instances, would, in our judgment, be ³⁶³ the actual result. Thus the commerce clause of the federal constitution would operate as a mere cloak to permit an evasion of state taxation on the part of a large and growing class of personal property.

The conclusion we have reached we believe to rest upon sound reason, and upon principle to be sustained by the authorities cited and reviewed in our previous opinion, as well as by others to be hereinafter referred to.

When property is held for any other purpose than that of continuing the shipment within a reasonable time, it cannot be considered as in transit: Prentice and Egan on the Com-

merce Clause, 63; Standard Oil Co. v. Combs, 96 Ind. 179, 49 Am. Rep. 156; Myers v. Commissioners, 83 Md. 385, 55 Am. St. Rep. 349, 35 Atl. 144; Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N. E. 354; Rieman v. Shepard, 27 Ind. 288. The general rule is that when goods are held for any other purpose than for transportation, the transit has ceased: Prentice and Egan on the Commerce Clause, 224. A state may tax all property which has a situs within its limits, regardless of the fact that it may have come from, or is destined to, another state: Prentice and Egan on the Commerce Clause, 225.

In the case of Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N. E. 354, the lumber company, having its place of business at Burlington, Iowa, bought logs in Wisconsin and Minnesota, where they were rafted and towed down the Mississippi river to the company's mills. Some of the logs would be stopped on the way down the river at New Boston harbor, in Illinois, and left there until needed at the mills. In sustaining a tax assessed by New Boston upon the logs in the harbor at that town in May, 1885, the court, reaching the conclusion that the property was not in transitu, said, "New Boston harbor, or Sturgeon bay, as it is usually called, is only thirty miles up the river from Burlington. It is very accessible, and it seems plain that the company had selected the bay as a place of storage for its logs—a place where its property could be shipped and kept in safety until such time as it was needed at the mills in Burlington. Indeed, for all practical ³⁶⁴ purposes, it may be said that the transit of the property ended at New Boston.

"The property was therefore kept at New Boston on account of the profit of the owners to keep it there. The company made money by the transaction. . . . If, then, the company had this property located in our state, and it was here for profit, and it was so located as to claim the protection of our laws, the property, in our opinion, had a situs here, and was liable to taxation."

Now in the case at bar, the property was not kept in storage, but it was used for a profit to the owner, and it was so located as to claim the protection of our laws. In our view of the agreed statement, it is doubtful if the transportation of the sheep could be considered as having commenced until their shipment at Pine Bluffs Station, under the rule laid down in Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. Rep. 475, referred to

in our former opinion: *Kelley v. Rhoads*, 7 Wyo. 263, 75 Am. St. Rep. 904, 51 Pac. 593. We discover little distinction, if any, in respect to the matter under discussion, between storage in transit and grazing in transit.

In *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156, the Indiana court, conceding that property in transit through that state, and there only for the purpose of transportation, would not be subject to taxation, said: "Property within the state for the purpose of undergoing any part of the process of manufacture is here for more than a temporary purpose connected with its transportation. The situs of the property does not depend upon the extent of the work that is to be done upon it, for, if it is here to be put through any of the stages in the process of its manufacture, it is here for a purpose which legitimately subjects it to taxation." In that case, the property consisted of staves which the plaintiff had contracted for to be delivered to it at Pittsburg, Pennsylvania; but under the contract they were first to be delivered at the yards of plaintiff, in Perry county, Indiana, to receive a finishing touch called "bucking," and then to be shipped to plaintiff at Pittsburg. The court said further: "Property ³⁶⁵ in this state for the purpose of being subjected to a process essential to its fitness for sale or use is situated here, no matter what may be its ultimate destination."

It seems unnecessary to enlarge upon the applicability of the principle announced in the above-mentioned case to the question now before us. The property, of course, in the case at bar, was not here for any process in the way of manufacture; but the principle is precisely the same, the difference existing in the character of the property. The sheep were here to be maintained while in transit to a shipping point, by feeding upon a valuable natural product of our soil, and which in itself furnishes the possibilities for the largest and most profitable industry of our state. It is of no consequence, whatever, that transportation on foot would be cheaper than by rail. Probably it would not be any less expensive if the owner was obliged to follow the public highways and purchase feed for his sheep en route. The cheapness consists in the benefits to be derived from the grazing of the sheep. Taking into account the nature of the property, and the customary method of its maintenance, and the principle would be the same whether the sheep were brought into the state and kept the same length of time in a single county, and then shipped by rail, or caused to tra-

verse two or more counties, or the entire state, and then shipped, the purpose to graze them existing in either case. They are susceptible of grazing, as much as necessary for a reasonable maintenance, by the latter method as by the former.

The same question in relation to cattle was before the supreme court of Oklahoma: *Halff v. Green*, 10 Okla. 338, 62 Pac. 816. It was said in that case: "The allegation in the petition that 'the cattle were brought into the reservation for the purpose of grazing the same in transit to market,' is not sufficient to take these cattle out of the general rule": See, also, *Collins v. Green*, 10 Okla. 244, 62 Pac. 813; *Lasater v. Green*, 10 Okla. 335, 62 Pac. 816; *Russell v. Green*, 10 Okla. 340, 62 Pac. 817. In *Russell v. Green*, 10 Okla. 340, 62 Pac. 817, the court say: "It is next contended ³⁶⁶ that these cattle were what is known as 'through cattle'; that they were only stopped off in the Osage Indian reservation so that they could rest and recuperate; that they were to be shipped on to market after they were pastured a short time. This position is taken only for the purpose of evading the true spirit of the transient property act. The petition itself shows that the object and purpose of locating these cattle in the Osage Indian reservation was to graze them and put them on the market some time during the summer or fall. In other words, the owner intended to fatten them on the grass in the reservation and then market them in the fall. These cattle were properly taxable, and the owner cannot evade taxation by calling them 'through cattle.'"

A similar question arose in Texas. The owners of certain cattle assessed in Texas sought to avoid the tax on the ground that the cattle were only passing through Texas en route from Oklahoma to Chicago. The cattle in question were brought from their accustomed range in Oklahoma Territory to some feeding-pens of the owners at Bowie, in Montague county, Texas, to be fattened for market. They were first driven to Waggoner, Texas, and thence carried by rail to Bowie, under written contracts, fixing Chicago as the place of their ultimate destination, consigned, however, to the owners themselves.

The cattle were unloaded at Bowie, and fed there for about ninety days, when they were carried to market under bills of lading naming Waggoner as the initial point.

The court say: "We are not inclined to hold that cattle in Texas, while being fattened in the owner's pens for the outside markets, are too transient to have a situs and to be taxable

here. Indeed, feeding cattle for such markets has become, as grazing cattle has long been, a permanent as well as extensive and profitable pursuit of the Texas people. It is a local industry, and during the feeding season the cattle, from whatever source they may come, become an important part of the mass of personal ³⁶⁷ property of the state, enjoying alike the protection of our laws, and subject to the common burden of taxation. . . . Still less are we inclined to hold that cattle so situated are exempt from local taxation in consequence of the commerce clause of the constitution. If it should be so held, then to what movable property in the states may not this ever-expanding clause be extended? The paper cloak of an adjustable through bill of lading, like these found in this record, may thus be easily made broad enough to cover from local taxation all the cattle of Texas, whether grazing in pastures, or on the open range, or feeding in pens. To the feeding in transit privilege need only be added the grazing in transit privilege, and all will be covered. If the owner may be allowed ninety days for feeding, why may he not be allowed six months or a year or two for grazing? In both cases the cattle may be said, figuratively speaking, to be on their way to Chicago or other market, their ultimate destination, but not in the sense of interstate commerce or tax laws": *Wagoner v. Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 153. See, also, *Prairie Cattle Co. v. Williamson*, 5 Okla. 488, 49 Pac. 937.

Upon the statement of facts, we think the district court was justified in finding that the sheep of plaintiff in error were brought into this state for the purpose of grazing, and thus had acquired a situs here for the purpose of taxation; and we are of the opinion that the tax in no sense interfered with the operation of the interstate commerce clause of the federal constitution.

Indeed, we are convinced that the facts admitted as to the manner in which the sheep in question were handled or cared for was practically the same as that employed by residents of the state interested in the sheep-growing industry who submit to the revenue laws of the state without question.

The wild natural grasses of this state, in common with all the arid region of the west, do not grow in the same abundance as tame grass, nor furnish near the amount of feed per acre. This partially explains the reason for the ³⁶⁸ necessity of the almost constant movement of sheep sustained by graz-

ing, and renders more clear the reason for the average daily travel of a herd of sheep consisting of ten thousand head, as in the case at bar. The judgment will be affirmed.

Corn and Knight, JJ., concur.

Taxation of Livestock.—If the purpose of an owner of livestock in bringing them into the state is not alone that of transportation, but also comprehends that of grazing them, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they are not exempt from taxation: *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904, 51 Pac. 593. See, also, the monographic note to *Buck v. Miller*, 62 Am. St. Rep. 465.

FISHER v. McDANIEL.

[9 Wyo. 457, 64 Pac. 1056.]

CONTEMPT.—AN ATTEMPT TO BRIBE A WITNESS, either in the presence of the court, or so near thereto as to interfere with its orderly procedure, is a contempt of court. (p. 973.)

CONTEMPT IN PRESENCE OF COURT, WHAT IS.—An attempt to bribe a witness in or near the courthouse building, although on a different floor from that on which the court is in session, is a contempt committed in the presence of the court. (p. 974.)

CONTEMPT—INDICTABLE ACT—JURISDICTION.—If an act is a contempt of court, the fact that it is also indictable as a criminal offense does not oust the jurisdiction of the court to punish the offender as for a contempt. (p. 977.)

CONTEMPT—INDICTABLE ACT—JURISDICTION.—A statute making an attempt to bribe a witness a criminal offense does not deprive the court of jurisdiction to punish such act as a contempt. (p. 978.)

CONTEMPT—CRIMINAL ACT—APPLICATION OF STATUTE.—Statutes empowering the court in all cases of conviction, when a fine is imposed, to order the accused committed to jail and prescribing the rate for determining the period of imprisonment for the nonpayment of the fine, are applicable to a criminal contempt committed by attempting to bribe a witness in the presence of the court. (p. 979.)

CONTEMPT.—An attempt to bribe a witness in the presence of the court is a criminal contempt. (p. 979.)

JURISDICTION—POWER OF COURT TO FINE AND IMPRISON.—Under statutes authorizing the court, in all cases of conviction when a fine is imposed, to order the offender committed to jail until the fine is paid, and prescribing the rate per day for determining the period of imprisonment for the nonpayment of the fine, the power of the court to order a person sentenced to pay a fine to be committed is not confined to cases where a fine only is inflicted, but also extends to cases where both imprisonment and fine are inflicted as a punishment. The latter sentence is not indeterminate. (p. 981.)

CRIMINAL LAW.—CONSTITUTIONAL PROVISIONS AS TO CRUEL AND UNUSUAL PUNISHMENT are aimed more at the form or character of the punishment than to its severity in respect to duration or amount. (p. 981.)

CRIMINAL LAW—CRUEL AND UNUSUAL PUNISHMENT. A punishment inflicted by a court for the commission of a crime should not be interfered with as cruel and excessive, except in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment, and violate the judgment of reasonable people. (p. 982.)

HABEAS CORPUS.—Mere errors of law are not reviewable on habeas corpus. (p. 982.)

J. H. Ryckman, P. L. Williams, and C. E. Blydenburgh, for the petitioner.

H. Merrill, county attorney, and J. A. Van Orsdel, attorney general, for the respondent.

463 **POTTER, C. J.** Upon the petition of Belle Fisher, claiming to be unlawfully imprisoned in the jail of Carbon county by the sheriff of that county, a writ of habeas corpus was allowed by one of the justices of this court and made returnable before the court. The case was heard upon the petition, the return, plaintiff's reply thereto, and briefs of counsel.

The return embraces the record of the proceedings resulting in the order for plaintiff's imprisonment, and attached to the reply is a certified copy of the testimony.

It appears that one Martin W. Foley was being tried in the district court of Carbon county, on the charge of murder, from the ninth day of July, 1900, to the fourteenth day of that month, inclusive. On the last-named date the county and prosecuting attorney presented an information charging that the petitioner herein, on the twelfth day of July, 1900, pending the trial of the Foley case, corruptly approached two of the witnesses for the state and attempted to bribe them to testify falsely in said case, and praying that she be ordered to appear and show cause why she should not be punished for contempt of court. To the information thus presented were attached the affidavits of the witnesses alleged to have been corruptly approached. An order was thereupon entered requiring the petitioner to appear at 2 o'clock on the same day and show cause why she should not be punished for contempt. She appeared in obedience to the order, and hearing **469** was had. The two witnesses aforesaid were examined, and the petitioner testified in her own behalf. Upon the submission of the matter, the following order was entered:

"On this fourteenth day of July, A. D. 1900, came Homer Merrell, county and prosecuting attorney of Carbon county, and Belle Fisher in person and by attorney, and thereupon the application of said Homer Merrell to this court that said Belle Fisher be ordered to appear and show cause why she should not be punished for contempt, in attempting to bribe certain witnesses who are in attendance upon this court in the case of the State of Wyoming v. Martin W. Foley, charged with murder, was read to her. And it appearing to the court that due service of a certified copy of said application and order of court issued herein was made upon the said Belle Fisher, she, the said Belle Fisher, now voluntarily appears and files no objection or answer to said proceedings and order, and said matter coming on to be heard, after hearing all the evidence on the part of the state and the defendant, the court, being fully advised in the premises, doth find that the said Belle Fisher did, on the eleventh day of July, A. D. 1900, at the city of Rawlins, in said county and state, corruptly approach and offer to certain witnesses, in attendance upon said court in the case of State of Wyoming v. Martin W. Foley, money and other valuable considerations, if they, the said witnesses, would modify their testimony and falsely swear in giving their testimony in said case.

"And the court doth now find the said Belle Fisher to be willfully and contumaciously guilty of such conduct and in contempt of court, and doth order, adjudge, and decree that the said Belle Fisher be fined in the sum of five hundred dollars (\$500) and the costs attendant upon this proceeding, and that an execution issue therefor; and that the said Belle Fisher be confined in the county jail of Carbon county, at Rawlins, for the term of six (6) months.

"And the said Belle Fisher is now by the court ordered **470** into the custody of the sheriff of Carbon county, in the state of Wyoming, and that she stand committed to the custody of the said sheriff until said fine is paid and said sentence served."

The first and principal contention on behalf of the petitioner is that her alleged conduct did not constitute a contempt, and hence that the court was without jurisdiction in the premises, and its judgment void. In her petition, plaintiff charges that her offense was not alleged or proven to have been committed in the presence of the court, or so near thereto as to obstruct the procedure of the court; and the argument of her counsel is based upon that assumption. It is

contended that an attempt to bribe a witness out of the presence of the court is not a contempt of court, but was punishable at common law as a crime, and was so punishable by statute in this state. It is not claimed that the court is without jurisdiction to punish as a contempt an act also indictable or punishable as an offense against the criminal laws, but it is conceded that the fact that an act is otherwise indictable does not deprive the court of the essential power to punish the same act as a contempt. It is, however, insisted that the offense charged against petitioner is not, and never was, a contempt of court. Counsel admit that the legislature cannot, by making an act indictable, interfere with the inherent authority of a court to punish for contempt, but they argue that neither the legislature nor the court is authorized to declare a crime to be a contempt, which has always been punishable as a distinct indictable offense at common law. It is practically conceded, if not in so many words, that the attempt to bribe a witness in the presence of the court, or so near thereto as to interrupt its orderly procedure, would amount to a contempt of court. In respect, therefore, to the question of jurisdiction, the contention of plaintiff's counsel is confined to the proposition that the acts charged to have been committed did not occur in the presence of the court, or so near thereto as to interfere with its procedure.

471 The information against the petitioner alleged that her conduct complained of occurred at the city of Rawlins, in the county of Carbon. The court was in session in that city. But the affidavits attached to the information and upon which it was founded were more specific. The witness Isherwood deposed that he was corruptly approached by the petitioner, near the courthouse, and that she proposed that if he modify his testimony in the Foley case, and swear falsely from the evidence given by him at a former trial, she would pay him three hundred dollars. According to the affidavit of the witness Stafford, he was approached by petitioner in the courthouse, and the proposition made to him was that if he would change his testimony she would do the right thing, "meaning that she would compensate" the witness for so changing his testimony and swearing falsely.

On the hearing, Isherwood, being asked to state the circumstances of the attempt of the petitioner to bribe him, testified as to the place where it occurred as follows: "At that time I was supposed to be upstairs as a witness. I went downstairs

to go to the water-closet; when I got down past the corner, Miss Fisher called me, and I stopped." He then related the conversation between the petitioner and himself, in which the attempt was made to induce him to change his testimony. Stafford testified that he was approached by the petitioner in the hall of the courthouse downstairs—in the corridors between the two doors—and at that place the proposition was made to him to give false testimony. Both parties were in attendance upon the court as witnesses for the state in the criminal case already mentioned. Miss Fisher denied having made any corrupt propositions to either witness; but in giving her version of the affair she fixed the place of the conversation as "downstairs here," and again, "there in the stairway" she stated that several persons were present, and some talk ensued, which she related, and that Doctor Stafford turned aside in the little hallway, and she had some further conversation with him there. She admitted, ⁴⁷² however, having met Isherwood at the corner of the courthouse, or "in" the corner, but denied having attempted to induce him to swear falsely.

In the case of *Ex parte Savin*, 131 U. S. 267, 9 Sup. Ct. Rep. 699, it appeared that the petitioner had been adjudged guilty of contempt for having improperly endeavored to deter a witness from testifying in a case in behalf of the government, the offense of petitioner having been committed once in the jury-room, temporarily used for witnesses, and once in the hallway of the court building immediately adjoining the courtroom. The question arose whether the misbehavior occurred in the presence of the court. It was held that it did. The court said: "The jury-room and hallway where the misbehavior occurred were parts of the place in which the court was required by law to hold its sessions," and after quoting the following from Bacon in his essay on Judicature: "The place of justice is a hallowed place, and therefore not only the bench, but the footpace and precincts and purprise thereof ought to be preserved against scandal and corruption," the court said further: "We are of opinion that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses; and misbehavior anywhere in such place is misbehavior in the presence of the court. . . . If, while Flores was in the courtroom waiting to be called as a witness, the appellant had attempted to deter him from testifying on behalf of the government, or had there offered him

money not to testify against Gougou, it could not be doubted that he would have been guilty of misbehavior in the presence of the court, although the judge might not have been personally cognizant at the time of what occurred. But if such attempt and offer occurred in the hallway just outside of the courtroom, or in the witness-room, where Flores was waiting in obedience to the subpoena served upon him, or pursuant to the order of the court, to be called into the courtroom as a witness, must it be said that such misbehavior ⁴⁷³ was not in the presence of the court? Clearly not." The Savin case is strongly in point, the facts being very much the same as in the case at bar, certainly as to the attempt upon the witness Stafford. Upon the principle laid down in that case no doubt can exist but that the offense of petitioner, within legal contemplation, was committed in the presence of the court.

The bribing of witnesses or jurors strikes at the very foundation of judicial determination; and the court would be shorn of much of its efficiency in the administration of justice if it possessed not the power to protect itself against such reprehensible conduct as the corrupt interference with witnesses in the very precincts of the court, where the witnesses assemble in obedience to subpoena, and while waiting to be called to give their testimony. Witnesses are not usually required to remain constantly in the courtroom, and if they are in the hallway, witness-room, if any, or about the building within easy call, the purpose of their attendance is ordinarily subserved until they are required to take the stand. When in the building in obedience to subpoena or order of court, they are in attendance upon the court, and subject to its order, and we are not inclined to adopt so technical a construction of the law as would permit a person to station himself within the building where the court is held, and there attempt to corruptly influence the testimony of witnesses without fear of being punished for contempt. The argument of counsel that such conduct would not be in the presence of the court, or so near thereto as to interfere with its procedure, or obstruct the administration of justice is, to say the least, unreasonable. It is moreover opposed not only by the decision of the United States supreme court in the Savin case, but by other eminent authorities.

In *Sinnott v. State*, 11 Lea, 281, it was held that one was guilty of contempt who approached the deputy sheriff, while engaged in summoning jurors, with a list of names of persons

which he endeavored to induce the deputy to summon as jurors, and also approached ⁴⁷⁴ another deputy and sought to induce him to summon a certain person upon the panel to the sheriff unknown, although neither of said acts were committed in the courthouse, or in the actual presence of the court. The statute provided that a "willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice," is a contempt, and also that an abuse of or unlawful interference with the process or proceedings of the court is a contempt. The court said: "The attempt of defendant to induce the officers of the court to summon as jurors in the particular case then to be tried certain persons specified by him in preference to others, or, in common parlance, to 'pack' a jury, was an unlawful interference with the proceedings of the court within the purview of said provisions, and was a contempt for which he was punishable by the court. Nor was it material that it was not within the courthouse, or in the immediate presence of the court."

In the case of *In re Brule*, 71 Fed. 943, the accused was charged with having, by the use of money, persuaded another to conceal and hide himself and absent himself from court, to avoid the service of a subpoena upon him, and thereby prevented the government from using him as a witness upon a criminal trial. He was adjudged guilty of contempt, and it was held that the act was punishable as a contempt, though it was done at the residence of the witness, at some distance from the courthouse, in the town where the court was sitting, on the ground that it constituted a misbehavior so near to the court as to obstruct the administration of justice. The learned judge stated in the opinion that had the particular misbehavior charged occurred anywhere within the building where the court was held it would have been misbehavior in the presence of the court, and added: "If it is a contempt to bribe a witness in front of the courthouse door, is it not a contempt to do the same thing on the street opposite the court building, or four blocks away? Is not the result the same? Is not the motive of the ⁴⁷⁵ accused the same? What difference does it make whether the attempt was made on the ground owned by the United States, or at the residence of the witness in the same town, four blocks, or about one-quarter of a mile away, from the court building? In one case the misbehavior would be construed to be in the presence of the court, and in the other 'so near thereto as to obstruct the administration of justice,' and the

statute, in clear language, is made to apply to both cases": See, also, *Ex parte Cuddy*, 131 U. S. 280, 9 Sup. Ct. Rep. 703; *Montgomery v. Circuit Judge*, 100 Mich. 436, 59 N. W. 148; *Langdon v. Wayne Circuit Judges*, 76 Mich. 358, 43 N. W. 310; *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691, 45 N. E. 199; *Steube v. State*, 3 Ohio C. C. 383.

In *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691, 45 N. E. 199, the party adjudged to be in contempt had, by promising to pay the expenses of a witness, who had been subpoenaed, induced her to leave the county, and thereby prevented her appearance as a witness at the trial of a criminal case. The act was held to be a contempt of court and punishable as such, notwithstanding that it was by statute constituted a distinct criminal offense, and that no express provision of the statute made the statutory punishment cumulative.

It is well settled that if an act is a contempt of court, the fact that the same act is indictable as a criminal offense does not take away the jurisdiction of the court to punish the offender as for a contempt. We understand this general principle to be conceded, while it is contended that a different rule governs this case. We do not think so. The case comes fairly within the general doctrine, and we apprehend that enough has been said to render further discussion unnecessary.

It is insisted that as section 5087 of the Revised Statutes, providing for the punishment as a misdemeanor of one guilty of disobeying a subpoena, expressly states that it shall not prevent summary proceedings for contempt, while section 5088 contains no such reference to contempt proceedings, and is not therefore expressly rendered cumulative, the remedy under the last-named ⁴⁷⁶ section for the acts covered thereby is sole and exclusive, and deprives the court of the power to punish such acts as for a contempt.

Under similar statutory provisions, the contrary was held in *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691, 45 N. E. 199, upon facts already alluded to in referring to that case. The statute in question (section 5088) provides that "whoever corruptly, or by force or threats or threatening letters, endeavors to influence, intimidate, or impede any juror, witness, or officer in the discharge of his duty, or by threats or force obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice in any court of this state, shall be fined not more than one thousand dollars, to which

may be added imprisonment in the county jail not more than sixty days nor less than ten days."

The act of petitioner clearly amounting to a contempt, bearing in mind the general rule above adverted to, that making an act indictable as an offense does not invade the powers of a court to punish for contempt, we are not disposed to hold that petitioner was liable to be proceeded against only under section 5088. The power to punish for contempts in facie curiae is inherent in all courts of superior jurisdiction. Legislative authority is not required for its existence or exercise. In this state indeed there is no statute conferring the power in such a case as the one at bar. We are clearly of the opinion that section 5088 is not exclusive, and that where the act amounts to a contempt, it may be punished as such.

The judgment of the court was that the petitioner be fined in the sum of five hundred dollars, and be imprisoned in the county jail for the term of six months, and she was ordered into the custody of the sheriff and to stand committed until the fine is paid, and the sentence served. The term of imprisonment specified in the order has been served, and the petitioner is in custody for nonpayment of the fine. It is contended that as to imprisonment for the fine the sentence is indeterminate, ⁴⁷⁷ and therefore void. The argument is that we have no statute applicable to contempt cases prescribing the period of imprisonment for nonpayment of a fine, and that the statutes controlling that matter in the case of crimes do not apply where the sentence embraces both fine and imprisonment.

Section 5195 of the Revised Statutes provides that: "Any court shall have power, in all cases of conviction when any fine is inflicted, to order, as part of the judgment of the court, that the offender shall be committed to jail, there to remain until the fine and costs are fully paid, or otherwise legally discharged."

It is provided by section 5200 as follows: "Any person committed to jail for nonpayment of fine or costs, or both, may be imprisoned therein until such imprisonment, at the rate of one dollar per day, equals the amount of such fine or costs, or both, as the case may be, or the amount shall be otherwise paid, or secured to be paid, when he shall be discharged."

It is apparent that the contempt for which petitioner was tried and convicted is criminal in its nature. Some difficulty has arisen out of the attempt to classify contempts, but peti-

tioner's conduct was a direct contempt—a contempt in facie curiae—and comes squarely within the class of criminal contempts. The offense being of a criminal character, we think it clear that the statutes empowering the court, in all cases of conviction when any fine is inflicted, to order the offender to jail and committed, prescribing the method or rate for determining the period of imprisonment for nonpayment of the fine, are applicable: *In re Whitmore*, 9 Utah, 441, 35 Pac. 524.

Some California cases are cited upon the proposition that where the sentence imposed comprises both fine and imprisonment, the statute authorizing the court to direct imprisonment at a prescribed rate per day for nonpayment of the fine is inapplicable: *In re Rosenheim*, 83 Cal. 388, 23 Pac. 372. The statutes of Utah having been borrowed from California, the construction placed ⁴⁷⁸ upon them by the courts of the last-named state is followed in Utah: *Roberts v. Howells*, 22 Utah, 389, 62 Pac. 892.

The reason for that construction is found in the peculiar language of the various statutory provisions, and it was held that the legislature had failed to provide for the case of a sentence where a definite term of imprisonment, and also a fine coupled with imprisonment until its payment, has been imposed. Under a statutory provision quite similar to that of California, a contrary view is held in Iowa: *State v. Myers*, 44 Iowa, 580. See, also, *In re Beall*, 26 Ohio St. 195. But our statutes do not follow the phraseology of the California and Utah statutes, and the decisions in those states are not controlling: *In re McDonald*, 4 Wyo. 150, 33 Pac. 18. Counsel maintains that section 5200 was enacted to make definite and operative section 5199, and with sole reference thereto. Section 5199 provides that in the event of a sentence to pay a fine and costs, or to imprisonment and costs, the court may direct that in case of nonpayment the defendant be put to work either in or without the prison until such fine and costs shall be paid. A mere reference to the statutes as originally enacted will serve to demonstrate the unsoundness of counsel's position. Section 5200, or rather the provision for which it was afterward substituted, was enacted in 1869 as a part of the criminal code, and provided that whenever a fine shall be the whole or part of a sentence, the court may, in its discretion, order the person sentenced to be confined in the county jail, until the amount of the fine and costs be paid. The crimes act of 1890 repealed that provision, and in its stead

embraced section 5200 in its present shape except that the rate was fixed at one dollar and fifty cents per day, and imprisonment was limited to sixty days, which was changed by the succeeding legislature to one dollar per day, and the limitation as to time omitted. The provision found in section 5199, however, was not enacted until 1873: See Comp. Laws 1876, p. 168. And the crimes act of 1890 allowed section 479 5199, then section 3332, of the Revised Statutes of 1887 to remain undisturbed. Hence it is apparent that the two sections 5199 and 5200 were not originally so connected as to require the latter to be construed solely with reference to the former. But section 5200 does not contain the only provision authorizing imprisonment for nonpayment of a fine. The language of section 5195, which was section 1063 of the revision of 1887, is sufficiently general to include the case of a fine, whether it be imposed as the whole or only part of a sentence. "Any court shall have power, in all cases of conviction when any fine is inflicted, to order" that the offender be committed. We perceive no reason for holding that this language refers only to a case of fine disassociated from a sentence for a definite term of imprisonment. It embraces all cases of conviction when any fine is inflicted. We are of the opinion that it clearly covers a case where the sentence embraces both fine and imprisonment. The sentence is not, in our judgment, indeterminate, since the statute fixes the rate at which such a sentence is to be executed by imprisonment.

It is claimed that the sentence violates section 14 of article 1 of the constitution which prohibits the imposition of excessive fines, and the infliction of cruel and unusual punishment. It may be said to be fairly well settled that constitutional provisions as to cruel and unusual punishments are aimed more at the form or character of the punishment rather than its severity in respect to duration or amount: 8 Ency. of Law, 2d ed., 440; *In re McDonald*, 4 Wyo. 150, 33 Pac. 18; *State v. Becker*, 3 S. Dak. 29, 51 N. W. 1018. But we are not prepared to decide absolutely, nor is it necessary that we do so, that a term of imprisonment or a fine provided by statute or the judgment of court could not in any case be held to be cruel or unusual, although entirely disproportionate to the offense committed. In the case in hand, the punishment is certainly neither cruel nor unusual in respect to its character. If it violates the constitution, it is because the fine imposed is an excessive one. But it is evident that much latitude must

be ⁴⁸⁰ accorded the legislature in prescribing the degree of punishment for crime, as well as to the courts in imposing sentence; and that to be held excessive in any case it should be so out of proportion to the offense as to shock the moral sense of the people, or, as said in *State v. Becker*, 3 S. Dak. 29, 51 N. W. 1018, "so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally." In that case it was said further that a punishment would not be interfered with as cruel or excessive, "except in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people." Counsel have referred to the statutes of some other states limiting the penalty in cases of contempt. It is to be observed therefrom that quite a difference exists between them, from a fine of thirty dollars, and imprisonment for thirty hours in Kentucky, to a fine of five hundred dollars, and five days' imprisonment in California, six months' imprisonment in New York, and a like term in Wisconsin, and until costs and expenses are paid. We have not taken occasion to investigate the statutory limitations in states not mentioned in the brief of counsel. The sentence imposed in the Savin case, *supra*, was one year's imprisonment. While in the case of petitioner, the sentence is severe, and doubtless intended to be so, we cannot say that it is altogether disproportionate to the offense, and so cruel or excessive as to meet or merit the condemnation of a reasonable public sentiment. The corrupt attempt to influence the testimony of witnesses in a pending trial, in the building where the court is in session, and the witnesses are assembled, certainly calls for punishment such as may properly be inflicted in case of a flagrant misdemeanor. The trial court had the parties before it, and moreover the matter is not before us on error. The court otherwise having jurisdiction, the sentence must be so excessive, before we could interfere on habeas corpus, as to clearly violate the constitutional provision, and be, for that reason, utterly void.

⁴⁸¹ The other matters urged in support of petitioner's application for discharge are such as go merely to the regularity of the proceedings, and do not affect the validity of the judgment. Mere errors of law, if any, are not reviewable in this proceeding, as habeas corpus does not take the place of a proceeding in error. For the reasons given we are of the opinion

that the court had jurisdiction in the premises, and that its judgment is not void. The petition will be dismissed.

Corn and Knight, JJ., concur.

It is a Contempt for a stranger to make arrangements with a juror to signal views of the jury to him after the jury have retired to deliberate: *State v. Doty*, 32 N. J. L. 403, 90 Am. Dec. 671; or to report for gain that a juror can be bribed: *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; or to induce witnesses to absent themselves from court or remove them beyond the jurisdiction of the court: *In re Nickell*, 47 Kan. 734, 27 Am. St. Rep. 315, 23 Pac. 1076; *Hale v. State*, 55 Ohio St. 210, 60 Am. St. Rep. 691, 45 N. E. 199. In fact, all acts which impede, embarrass, or obstruct a court, or which tend to produce such effects, whether done in or out of court, are to be considered as done in the presence of the court, and are punishable as contempts: *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528. That a given act is indictable does not deprive a court of punishing it as a contempt: *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157, 36 S. E. 630. Imprisonment for contempt is not in any just sense a punishment: *Frankel v. Frankel*, 173 Mass. 214, 73 Am. St. 266, 53 N. E. 389.

Habeas Corpus is not a remedy to review mere errors and irregularities, but only such jurisdictional defects as render the proceedings void: *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382, 62 Pac. 661; *In re Fanton*, 55 Neb. 703, 70 Am. St. Rep. 418, 76 N. W. 447; *Ex parte Roberson*, 123 Ala. 103, 82 Am. St. Rep. 107, 26 South. 645, monographic note to *Koepke v. Hill*, ante, pp. 167-203.

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ACTIONS.

1. ACTIONS—PLEA OF PRIOR ACTION PENDING—EVIDENCE OF DISMISSAL.—If the defendant pleads a prior action pending, it is not an abuse of discretion to open the case after submission to admit proof that the prior action has been dismissed. (*Loewenthal v. Coonan*, 115.)

2. PRACTICE—SPLITTING CAUSES OF ACTION.—WHERE SEVERAL ARTICLES OF PERSONAL PROPERTY ARE WRONGFULLY TAKEN FROM THE OWNER BY A SINGLE ACT, but one cause of action accrues to him, and he must pursue his remedy in a single action. A recovery for any of such articles precludes any recovery for the remainder. (*Stern v. Riches*, 892.)

3. PRACTICE.—A SINGLE ACTION ONLY CAN BE MAINTAINED for the levy of an attachment upon property exempt from execution and the refusal to surrender it to the defendant, though some of the articles were of such a character that it was the duty of the officer to deliver them on demand, and as to others, he had a right to retain them in his possession for a reasonable length of time to enable him to make an inventory and appraisement, and the defendant to select, claim, and receive in return his exempt portion. (*Stern v. Riches*, 892.)

ADULTERATION OF FOOD.

1. ADULTERATION OF FOOD.—IF ONE IS FOUND IN THE POSSESSION of adulterated milk, under circumstances from which it may be inferred that the adulteration is recent, it is incumbent

on him, in a prosecution therefor, to show that the adulteration was without his knowledge. (Isenhour v. State, 228.)

2. ADULTERATION OF FOOD—EVIDENCE.—IF A MILK VENDER uses a "preserver," what he did to ascertain whether it is an adulterant is admissible in evidence, in a prosecution for selling adulterated milk, in explanation of his assertion that he did not know the milk was adulterated. And if he thereby overcomes the presumption of guilty knowledge raised by the possession of adulterated milk, he should be acquitted. (Isenhour v. State, 228.)

3. ADULTERATION OF FOOD.—AN AFFIDAVIT CHARGING that the defendant "had in his possession, with intent to sell the same, one pint of milk then and there adulterated with a certain substance injurious to health, to wit, formaldehyde," is not bad for want of an allegation that formaldehyde is either poisonous or injurious to health. (Isenhour v. State, 228.)

4. ADULTERATION OF FOOD.—AN AFFIDAVIT CHARGING one with having the possession of adulterated milk need not allege that it was adulterated by him. (Isenhour v. State, 228.)

5. ADULTERATION OF FOOD.—IN AN AFFIDAVIT CHARGING one with the possession, with intent to sell, of adulterated milk, it is not necessary to allege that the milk violates some rule, ordinance, or standard prescribed by the state board of health, under a statute imposing on such board the duty to prescribe rules and standards. (Isenhour v. State, 228.)

6. ADULTERATION OF FOOD—WHO MAY PROSECUTE FOR.—A provision of a pure food law imposing the duty to enforce it upon the state board of health does not exclude individuals from making complaint of an offender. (Isenhour v. State, 228.)

7. ADULTERATION OF FOOD.—THE PROVISIO OF A PURE FOOD LAW need not be alleged in an affidavit charging a violation of the statute. (Isenhour v. State, 228.)

8. PURE FOOD LAW—WHEN TAKES EFFECT.—A provision of a pure food law that within ninety days after its passage the state board of health shall adopt measures to facilitate its enforcement does not postpone the taking effect of the law until this duty is performed. (Isenhour v. State, 228.)

ADVANCEMENTS.

1. ADVANCEMENTS—PAYMENT OF.—HEIRS OF AN INTESTATE may sue another heir to have the share of the latter in the lands of the intestate subjected to the payment of advancements made to him, and to have the lien of a creditor, acquired by the levy of an attachment upon the undivided interest of such heir in the lands, declared subordinate to their equity. (Comer v. Shehee, 78.)

2. ADVANCEMENTS—INTEREST.—An heir to whom advancements have been made cannot be charged with interest thereon. (Comer v. Shehee, 78.)

3. ADVANCEMENTS—JOINDER OF ACTIONS.—IN A SUIT FOR PARTITION, the court may entertain and settle equities growing out of advancements. (Comer v. Shehee, 78.)

4. ADVANCEMENTS—PARTITION.—JOINDER OF ACTIONS IN A SUIT TO SUBJECT THE INTEREST OF AN HEIR in the lands of an intestate to the payment of advancements made to

him, the court may make a partition of such lands, or order a sale of them, and divide the proceeds equitably among those entitled to them. (*Comer v. Shehee*, 78.)

5. **ADVANCEMENTS—CREDITORS OF HEIR.—A PROBATE DECREE** ascertaining that an advancement was made to an heir, and the amount thereof, is binding on the creditors of such heir. (*Comer v. Shehee*, 78.)

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION—OCCUPATION OF RAILROAD RIGHT OF WAY.**—Adverse possession of a portion of a railroad right of way, inconsistent with its use as such, maintained for the statutory period of limitation, confers title on the occupant, and bars the right of the railroad company to recover possession. (*Northern Pacific Ry. Co. v. Ely*, 766.)

2. **ADVERSE POSSESSION OF RAILROAD RIGHT OF WAY—ESTOPPEL.**—If a railroad company permits portions of its right of way to be occupied by settlers, under pre-emption and homestead laws, without objection, for more than ten years, and such occupants plat the land into city lots, make valuable improvements thereon, and expend vast sums of money for taxes and street assessments, the company is estopped from asserting title to such portions of its right of way. (*Northern Pacific Ry. Co. v. Ely*, 766.)

3. **ADVERSE POSSESSION OF RAILROAD RIGHT OF WAY—DEFENSE OF PUBLIC POLICY.**—If a railroad permits another to occupy its right of way until his title becomes perfect by adverse possession, the company cannot set up the defense that its right of way was granted for public purposes, and that it is against public policy to permit the abandonment of the right of way, as such, or the acquisition of title thereto either by adverse possession or by way of estoppel against the company. (*Northern Pacific Ry. Co. v. Ely*, 766.)

4. **PRESCRIPTION.—THE REAL OBJECT OF A STATUTE RELATING TO ADVERSE POSSESSION** is to prevent litigation, and to quiet title to land which has remained in the possession of another adversely and in hostility to its true owner for the specified period of time. (*Northern Pacific Ry. Co. v. Townsend*, 342.)

5. **PRESCRIPTION.—A RAILWAY COMPANY MAY BE DEPRIVED OF A PART OF ITS RIGHT OF WAY** by adverse occupation for the statutory period of time. (*Northern Pacific Ry. Co. v. Townsend*, 342.)

6. **PRESCRIPTION.—REAL PROPERTY BELONGING TO MUNICIPAL CORPORATIONS** and quasi public corporations can be lost under the statute by adverse possession. (*Northern Pacific Ry. Co. v. Townsend*, 342.)

7. **PRESCRIPTION.—THE RIGHT OF A RAILWAY COMPANY UNDER AN ACT OF CONGRESS** to use and occupy a right of way over the public domain four hundred feet wide is subject to the statute relating to adverse possession. (*Northern Pacific Ry. Co. v. Townsend*, 342.)

8. **PRESCRIPTION.—THE MAKING OF A HOMESTEAD ENTRY** under the United States homestead laws initiates an adverse and hostile claim to the land as against third parties which will ripen into a good title by adverse possession if continued for the period of time required by the statute of limitations. (*Northern Pacific Ry. Co. v. Townsend*, 342.)

See Easements, 6.

AGENCY.

1. AGENCY.—ONE WHO IS INTRUSTED WITH MONEY for the purpose of changing it or having it changed is an agent. (*Eggleston v. State*, 17.)

2. THE STATUTE OF LIMITATIONS BEGINS TO RUN AS BETWEEN A PRINCIPAL AND AN AGENT where the agency is continuous and involves many acts and collections of money at the termination of the agency. (*Rowan v. Chenoweth*, 796.)

3. NOTICE IS IMPUTED TO A PRINCIPAL of what his agent did within the actual or apparent scope of his agency. (*Andrews v. Robertson*, 870.)

4. A PRINCIPAL RATIFIES THE TRANSACTIONS OF HIS AGENT if, having knowledge of the facts, he insists on retaining the benefit of the transaction. If a principal does not intend to ratify the unauthorized act of his agent, he must, upon receiving knowledge of the transaction, repudiate it, and offer to return anything received in consideration of it. (*Andrews v. Robertson*, 870.)

See Evidence, 4, 5.

ANCIENT LIGHTS.

See Easements, 5.

ANIMALS.

1. WILD ANIMALS—OWNER'S LIABILITY.—The owner of a *beast feræ naturæ*, which gets loose and does harm to any person, is liable therefor, though he had no particular notice that the animal had done any such thing before. (*Crowley v. Groonell*, 690.)

2. DOMESTIC ANIMALS—OWNER'S LIABILITY.—If the owner of a domestic animal has notice of its propensity to commit the class of injuries complained of, he must restrain it at his peril. And it is no answer that the animal was not cross or savage and acted in good nature and playfulness. (*Crowley v. Groonell*, 690.)

3. DOGS—OWNER'S LIABILITY.—A cross and savage disposition on the part of a dog is not necessary in order to impose liability on its owner for its assault; a mischievous propensity is enough, if the case is otherwise made out. It makes no difference, in respect to the liability, whether the assault proceeds from good or ill nature, from playfulness or ugliness. (*Crowley v. Groonell*, 690.)

4. DOGS—LIABILITY FOR INJURY BY.—The owner of a peaceable dog of gentle and kind disposition is not liable in damages merely because the dog bites a person. Without some fault on the part of the owner, liability does not arise. (*Martinez v. Bernhard*, 306.)

5. DOGS.—THE HAIR OF THE DOG is not an antidote for his bite, and for injuries due to using it as such antidote his owner is not answerable. (*Martinez v. Bernhard*, 306.)

6. DOGS.—THE BITE OF A DOG is not ground for damages against his owner if the death of the person bitten is traced to another cause. (*Martinez v. Bernhard*, 306.)

7. A DOG IS PROPERTY, FOR THE NEGLIGENT KILLING of which an action will lie. (Louisville etc. R. R. Co. v. Fitzpatrick, 64.)

8. PROPERTY IN DOGS.—BY THE COMMON LAW, ownership of a dog carried with it property rights to afford the owner a civil remedy for injuries to the animal, but it was not a subject of larceny. (Louisville etc. R. R. Co. v. Fitzpatrick, 64.)

APPEAL AND ERROR.

1. APPEAL.—ASSIGNMENT OF ERROR.—WHERE THERE ARE SEVERAL FINDINGS OF FACT a general assignment of error that the decision is not supported by the evidence is insufficient to call in question the correctness of any particular finding of fact. (Parish v. City of St. Paul, 374.)

2. APPEAL.—THE DOCTRINE OF THE LAW OF THE CASE does not apply on the second appeal of the same case, where the evidence is essentially different from that on the first. (Kray v. Muggli, 332.)

3. APPELLATE PRACTICE.—JUDGMENTS OF NONSUIT.—Upon appeal from a judgment of nonsuit, the evidence must be construed as strongly as possible against the correctness of the ruling of the lower court. The plaintiff is entitled to judgment upon the merits if there is any substantial evidence in his favor. (Vermont Marble Co. v. Declez Granite Co., 143.)

4. APPEAL.—WEIGHT OF EVIDENCE.—The rule that the supreme court will not weigh the evidence on appeal has no exception in a proceeding to appoint a receiver. (Sheridan Brick Works v. Marion Trust Co., 207.)

5. APPEAL.—CONSTITUTIONAL QUESTIONS NOT REVIEWABLE.—One convicted of violating a penal statute has no right, on appeal, to have constitutional questions under the law decided that do not arise in his case, and in which he has no interest. (Isenhour v. State, 228.)

6. APPEAL.—GARNISHMENT.—THE RULINGS OF A COURT in striking out certain pleas of a garnishee cannot be reviewed on appeal, where neither the motions, pleas, nor the rulings of the court appear in the bill of exceptions. (Cottingham v. Greely Barnham Grocery Co., 58.)

7. APPELLATE PRACTICE.—IN RESERVED CASES a question whether an answer is sufficient to constitute a defense will not be answered on appeal, but must be decided by the trial court. (Farm Investment Co. v. Carpenter, 918.)

8. APPELLATE PRACTICE.—SUPPLYING RECORD.—Under a statute authorizing the appellate court to require the clerk of the court below to certify anything omitted from the transcript, or to dismiss the appeal on motion of respondent for such omission unless a cross-motion is made by appellant to supply the defect, a motion to dismiss an appeal because the transcript does not contain a notice of appeal should not be granted, where such omission is not the fault of the appellant, and he moves the court that the clerk of the court below be required to supply such notice. (Thibault v. Lennon, 657.)

9. TRIAL.—APPELLATE PRACTICE.—If no reply to material allegations of new matter in an answer is shown by the record, and other issues appear therefrom upon which the case might

have properly been tried, it is not presumed on appeal that it was tried upon the matters admitted by the pleadings. (*Ames v. Parrott*, 536.)

10. TRIAL—APPELLATE PRACTICE.—No advantage can be taken on appeal of failure to reply below where trial was had on the theory that a reply had been filed, unless there is something in the record from which an inference may be drawn that reply was waived, or from which the court may ascertain what issues were actually tried. (*Ames v. Parrott*, 536.)

See Benefit Societies, 5; Judgments, 1, 2.

ARBITRATION.

ARBITRATION — REAPPRAISEMENT — ESTOPPEL. —

Where one party to an award attacks it on the ground of fraud or misconduct of the referees and demands a reappraisement, and the other party determines to abide by the award and refuses to submit to a reappraisement, the latter is thereby estopped from thereafter demanding another appraisal, in case the charges shall prove to be sustained. (*Christianson v. Norwich Union Fire Ins. Soc.*, 379.)

See Insurance, 3-6.

ASSAULT.

See Criminal Law, 1.

ASSOCIATIONS.

See Benefit Societies.

ATTACHMENT AND GARNISHMENT.

1. ATTACHMENT.—SPECIAL STATUTORY PROVISIONS RESPECTING THE MANNER in which a levy of an attachment shall be made must be strictly observed, and a departure therefrom invalidates the levy. (*Ames v. Parrott*, 536.)

2. ATTACHMENT—ATTESTING WITNESSES—PLAINTIFF IN ATTACHMENT.—If the statute provides that the sheriff levying an attachment go to the place where the property of the defendant may be found, and declare in the presence of two residents of the county, who shall be attesting witnesses, that by virtue of the order he attaches such property at the suit of the plaintiff, the statute is not complied with by a levy and declarations in the presence of two persons, one of whom is the plaintiff in attachment. (*Ames v. Parrott*, 536.)

3. ATTACHMENT—RELEASE—BURDEN OF PROOF.—A SHERIFF who, in legal effect, releases a plaintiff's attachment without his consent has the burden of justifying his action by showing that the debtor in the attachment suit had no leviable interest in the property. (*Whitney v. Wagener*, 351.)

4. GARNISHMENT.—CHOOSES IN ACTION in the possession of a garnishee cannot be subjected by garnishment. (*Cottingham v. Greely Barnham Grocery Co.*, 58.)

5. THE PRINCIPLE THAT A GARNISHING CREDITOR CAN AVAIL HIMSELF ONLY OF THE LEGAL RIGHTS OF HIS DEBTOR against the garnishee is subject to an exception

when the garnishee has possession of property of the debtor under a fraudulent transfer, for, though such transfer is valid against the debtor, creditors may assert its invalidity. (Cottingham v. Greely Barnham Grocery Co., 58.)

6. GARNISHMENT.—IN DETERMINING THE VALUE OF NOTES AND ACCOUNTS received by a garnishee under a fraudulent conveyance, the criterion is the value of the property at the date of the transfer. (Cottingham v. Greely Barnham Grocery Co., 58.)

7. GARNISHMENT.—A TENDER OF ISSUE, AFTER A CONTEST OF THE ANSWER OF A GARNISHEE, may be filed at any time before the trial. (Cottingham v. Greely Barnham Grocery Co., 58.)

8. GARNISHMENT.—THE ISSUE TO BE MADE UP, AFTER A CONTEST OF THE ANSWER OF A GARNISHEE, in which the plaintiff must allege in what respect the answer is untrue, is in the nature of a complaint. (Cottingham v. Greely Barnham Grocery Co., 58.)

9. GARNISHMENT.—CONTEST OF ANSWER—ISSUE.—In contesting the answer of a garnishee, the Alabama statutes do not require the issue to be formed at the term of court at which the answer is made, but only that the plaintiff shall controvert by his oath, at such term, that he believes the answer to be untrue. (Cottingham v. Greely Barnham Grocery Co., 58.)

See Actions, 3; Appeal and Error, 6; Exemptions; Fraudulent Conveyances.

ATTORNEYS' FEES.

See Mortgages, 9.

BAILIFFS.

See Office and Officers.

BANKS AND BANKING.

1. BANKING.—AN OFFICER OR AGENT OF A BANK WHO RECEIVES A DEPOSIT IN DISOBEDIENCE OF A STATUTE and neglects to perform a duty imposed thereby is personally liable for all damages resulting proximately from such disobedience or neglect. (Hyland v. Roe, 873.)

2. BANKING.—AN ACCEPTANCE OF A DEPOSIT BY A BANK WHICH IS INSOLVENT, and therefore by a statute forbidden to continue in business, constitutes such fraud as entitles the depositor to reclaim his money. Such bank cannot honestly continue in business and receive the money of its customers. (Hyland v. Roe, 873.)

3. BANKING.—A DEPOSIT OF MONEY DOES NOT VEST THE TITLE THERETO IN THE BANK and convert the depositor into a general creditor, if it is at the time insolvent, and for that cause forbidden by a statute of the state to receive deposits. The depositor may elect to rescind the transaction and recover his money. (Hyland v. Roe, 873.)

4. BANK, INSOLVENT—IDENTIFICATION OF DEPOSIT FOR THE PURPOSE OF RECOVERY.—If the holder of a check

deposits it in a bank which, because of its insolvency, has no right to do business, and receives a portion thereof in cash and the balance in a certificate of deposit, and the receiving bank transmits the check to a drawing bank for payment, but it, to the extent of the sum named in the certificate of deposit, remains unpaid until after the insolvent bank closes its doors and has passed into the hands of a receiver, such balance remains capable of identification, and, if subsequently paid to the receiver, may be recovered from him by the depositor on surrender of the certificate of deposit. (*Hyland v. Roe*, 873.)

5. **RESCISSION, WHEN OFFER TO RETURN NECESSARY.** One who deposits a check in an insolvent bank, receiving a part of the amount in money and the balance in a certificate of deposit, and who wishes to rescind because of such insolvency, need not offer to return the amount actually received, where he seeks to recover the balance only. (*Hyland v. Roe*, 873.)

6. **RESCISSION PENDING OFFER TO RETURN.**—In a proceeding equitable in its nature to recover moneys deposited in an insolvent bank for which the depositor received a certificate of deposit, a demurrer is properly sustained, if there is no allegation of an offer to surrender such certificate. (*Hyland v. Roe*, 873.)

BENEFIT SOCIETIES.

1. **BENEFICIAL ASSOCIATIONS—BY-LAWS, WHEN RETROSPECTIVE.**—A by-law of a beneficial association declaring that any member of the order who, after a date specified, enters into the business of selling intoxicating liquors by retail shall be expelled, applies to members who had become such before the enactment of the by-law, though they were engaged in such business when they were admitted to the order, if they had discontinued it before the adoption of the by-law. (*Langnecker v. Trustees of Grand Lodge*, etc., 860.)

2. **BENEFICIAL ASSOCIATIONS—FORFEITURE OF INSURANCE BY BEING GUILTY OF CAUSE FOR EXPULSION.**—If a certificate of insurance issued by an order to one of its members provides that no liability shall accrue unless the member shall, in every particular, while a member, comply with all the by-laws of the order, and he is afterward guilty of an offense against the by-laws, for which he might have been expelled, his right to insurance is forfeited, though no proceeding was taken for his expulsion. (*Langnecker v. Trustees of Grand Lodge*, etc., 860.)

3. **BENEFICIAL ASSOCIATIONS.—ACTS MUST BE DEEMED PROHIBITED** by the by-laws of a beneficial association if they declare that a member guilty of them shall be expelled. (*Langnecker v. Trustees of Grand Lodge*, etc., 860.)

4. **BENEFICIAL ASSOCIATIONS.—FAILURE TO PAY ASSESSMENTS AFTER VOID EXPULSION** from a beneficial association does not defeat the member's right to benefits if he has been notified that the lodge will not receive any more from him, because it no longer regards him as a member. (*Langnecker v. Trustees of Grand Lodge*, etc., 860.)

5. **AN APPEAL FROM A VOID PROCEEDING IS NOT NECESSARY.** Hence a member of a beneficial association need not appeal from an order expelling him, if it is void. (*Langnecker v. Trustees of Grand Lodge*, etc., 860.)

6. BENEFIT SOCIETIES—DIVORCED BENEFICIARY.—If a member of a benefit society designates his then wife as his beneficiary in accordance with the laws of the society, and dies without changing his beneficiary, the person named, though subsequently divorced from him, is, upon his death, entitled to the benefit, to the exclusion of his second wife and his children by her. (*Courtois v. Grand Lodge of Ancient Order of United Workmen*, 137.)

7. BENEFIT SOCIETIES—DIVORCED BENEFICIARY.—If a member of a benefit society designates his wife as his beneficiary, and she afterward obtains a divorce, and the member then dies without having designated another beneficiary, the fact of the obtaining such divorce is not the legal equivalent of the death of the beneficiary designated, so as to give to the second wife of the member or his heirs any right to the benefit fund which must be paid to the divorced wife. (*Courtois v. Grand Lodge of Ancient Order of United Workmen*, 137.)

8. BENEFIT SOCIETIES — BENEFICIARIES — CONSTRUCTION OF BY-LAW.—If the by-laws of a benefit society provide that the beneficiary designated by the member and named in the certificate "shall, in every instance, be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him," such provision must be construed as referring to the relationship at the date of the certificate, and a designation of a beneficiary, valid in its inception, so remains, although such relationship has ceased by divorce, or otherwise, unless it is otherwise stipulated in the contract of membership. (*Courtois v. Grand Lodge of Ancient Order United Workmen*, 137.)

9. BENEFIT SOCIETIES—RIGHT OF ORDER TO CHANGE OF BENEFICIARY.—If a by-law of a benefit society vests in the designated beneficiary the right to the benefit money immediately upon the death of the member, no subsequent act or resolution of the order can divest it or devote it to the use of another. The prescribed mode of changing the beneficiary must be followed, and no change can be otherwise made. (*Courtois v. Grand Lodge of Ancient Order of United Workmen*, 137.)

BILLS AND NOTES.

See Negotiable Instruments.

BILLS OF LADING.

See Carriers, 6-8.

BOARD OF HEALTH.

See Health Officer.

BUILDING AND LOAN ASSOCIATION.

1. A BUILDING AND LOAN ASSOCIATION MAY BORROW MONEY and give its promissory note therefor. (*Marion Trust Co. v. Crescent Loan etc. Co.*, 257.)

2. LOAN ASSOCIATION—NOTE FOR UNAUTHORIZED PURPOSE.—A note given by a building and loan association for borrowed money may be enforced, though the association was insolvent, and the money was used in paying withdrawing stockholders, who

were not entitled to receive the whole of it, and the lender had knowledge of these facts. (*Marion Trust Co. v. Crescent Loan etc. Co.*, 257.)

3. BUILDING AND LOAN ASSOCIATIONS, CONDITIONS OF --RELIEF IN EQUITY FROM UNLAWFUL CONTRACTS WITH. One who borrows money from a foreign building and loan association, and enters into a contract with it, forbidden by the laws of the state, and secured by a trust deed of real property therein, and who seeks relief in equity against such deed, must do equity by paying the principal debt with legal interest, subject to credits of money already paid by him, together with any sums paid by the association for taxes, insurance, and other expenses necessary to preserve the property. (*Floyd v. National Loan etc. Co.*, 805.)

4. BUILDING AND LOAN ASSOCIATIONS.—THERE IS A DIFFERENCE BETWEEN A PREMIUM, the amount of which is fixed at the time a loan is made and then divided into installments, and paid periodically, and a premium of a specified sum, to be paid on each share each month for an indefinite and uncertain time, as until the maturity of the stock, and an association authorized to operate upon one of these systems cannot adopt the other without making the contract unlawful. (*Floyd v. National Loan etc. Co.*, 805.)

5. A BUILDING AND LOAN ASSOCIATION GOING INTO ANOTHER STATE TO DO BUSINESS is subject to the restrictions there imposed upon like associations, and if it does business on a plan not sanctioned by such restrictions, it cannot enforce its contract as a building and loan association contract. (*Floyd v. National Loan etc. Co.*, 805.)

6. A FOREIGN BUILDING AND LOAN ASSOCIATION CANNOT ENFORCE IN A STATE OTHER THAN THAT OF ITS CREATION a usurious note secured by a trust deed on property in the latter state, on the ground that the contract is to be deemed the contract of the state of the domicile of the corporation, and is there exempt from laws against usury, if the laws of the state where the suit is brought do not permit either individuals or corporations to make or enforce contracts such as that in question. (*Floyd v. National Loan etc. Co.*, 805.)

CARRIERS.

1. CARRIERS—GRATUITOUS CARRIAGE.—The mere nonpayment of fare, or gratuitous carriage, will not of itself deprive a traveler of his right of action for the results of negligence of the carrier. (*Russell v. Pittsburgh etc. Ry. Co.*, 214.)

2. CARRIERS—RELEASE OF LIABILITY.—A common carrier of goods or passengers cannot contract with a customer for a release from liability resulting from the carrier's negligence. (*Russell v. Pittsburgh etc. Ry. Co.*, 214.)

3. CARRIERS—SEQUESTRATION.—A CONSIGNEE IS OWNER of the goods until the contrary appears, and may maintain an action and sequestration against the carrier or his agent for their recovery. (*Sonia Cotton Oil Co. v. Steamer "Red River,"* 293.)

4. CARRIERS—SEQUESTRATION—GROUNDS FOR.—If, upon the arrival of goods at the place of delivery, the carrier fails to deliver them, and leaves with an apparent intention to carry them to another place, the consignee is entitled to resort to suit and sequestration to compel the delivery of the goods. (*Sonia Cotton Oil Co. v. Steamer "Red River,"* 293.)

5. **CARRIERS—DELIVERY—FAILURE OF CONSIGNEE TO ACCEPT.**—A carrier must offer to deliver the goods at a proper place and in a proper manner, and if the consignee fails to accept them, the carrier must put them in a place where they will not be exposed to loss. (*Sonia Cotton Oil Co. v. Steamer "Red River,"* 293.)

6. **CARRIERS—BILLS OF LADING—PRESUMPTION—EVIDENCE TO VARY.**—In the absence of fraud or error, a conclusive presumption arises in favor of a bill of lading, as written; but if error is committed by including terms in it binding the carrier to deliver the goods at an inconvenient and expensive place, the carrying part of the contract may be explained by parol evidence. (*Sonia Cotton Oil Co. v. Steamer "Red River,"* 293.)

7. **CARRIERS—BILLS OF LADING—DELIVERY.**—In case of error in a bill of lading as to the place of delivery, the carrier has no right to retain the goods, without an effort or offer to deliver and carry them beyond the place of delivery named in the contract. (*Sonia Cotton Oil Co. v. Steamer "Red River,"* 293.)

8. **CARRIERS—DELIVERY.**—Landing a portion of the goods at the place of delivery, and then returning them to the vessel and proceeding with the voyage, is not a sufficient delivery to exonerate the carrier from failure to deliver. (*Sonia Cotton Oil Co. v. Steamer "Red River,"* 293.)

9. **CARRIERS — DELIVERY — TENDER OF FREIGHT CHARGES.**—Before delivery, or effort to deliver the goods at the place of destination, the carrier is not entitled to any tender of freight charges. (*Sonia Cotton Oil Co. v. Steamer "Red River,"* 293.)

10. **CARRIERS—SPECIAL CONTRACT—GOODS IN BOND.**—If a carrier is clearly instructed to carry goods "in bond," and, disregarding such instructions, takes the goods out of bond without authority, thus rendering them of less value and causing a loss at the point of destination, he is liable for actual damages. (*Smith v. New Orleans etc. R. R. Co.,* 285.)

11. **CARRIERS—SPECIAL CONTRACT—LIABILITY OF CONNECTING CARRIERS.**—If goods are shipped "in bond" over connecting lines, and both carriers participate in taking them out of bond, contrary to instructions, thereby rendering them of less value and causing a loss at the place of destination, the liability for the actual damages is solidary as between the two carriers. (*Smith v. New Orleans etc. R. R. Co.,* 285.)

See Railroads.

CEMETERIES.

1. **NUISANCE.—CEMETERIES** are not nuisances except conditions be present which corrupt or foul the atmosphere by unwholesome or noxious stenches, or impregnate the water of wells or springs in the vicinity by percolation through the soil, thereby endangering the public health. (*Ex parte Wygant,* 673.)

2. **NUISANCE.**—A CEMETERY is not a nuisance per se, and whether the act of burying a dead body is the commission of a nuisance depends entirely upon its proximity to the inhabitation of the living, and the manner in which it is accomplished. (*Ex parte Wygant,* 673.)

3. **NUISANCE—CEMETERIES—POWER OF MUNICIPALITY.** Under a charter authorizing a city to declare what shall constitute

a nuisance, it cannot arbitrarily declare that to be a nuisance which is not so in fact, or made so by statute. Hence it cannot declare generally that the burial of the dead in any portion of the city shall constitute a nuisance, when interments may be made in the usual way in some sections thereof, without giving offense to the senses of any human inhabitant, or endangering the health of the community. (Ex parte Wygant, 673.)

4. **NUISANCE—CEMETERIES—ORDINANCE RELATING TO.** Under a charter authorizing municipalities to provide for the health, cleanliness, peace, and good order of the city, and to prevent and remove nuisances, a city may prescribe reasonable rules respecting the place and manner of burials within its limits, but it cannot arbitrarily prohibit them, unless such prohibition is a reasonable exercise of the power. (Ex parte Wygant, 673.)

See Municipal Corporations, 3.

CHAMBERS.

See Judgments, 19.

CHATTEL MORTGAGES.

1. **A CHATTEL MORTGAGE BY A FRAUDULENT VENDEE** is valid as to a mortgagee of the goods, who, in consideration of the mortgage, and without notice of the fraud, has extended the time of payment of his debt, or assumed any new or additional obligation. (Adam, Meldrum etc. Co. v. Stewart, 240.)

2. **A CHATTEL MORTGAGE TO SECURE AN ANTECEDENT DEBT** will not be sustained against a vendor who has been induced to part with the mortgaged property by the fraud of the mortgagor. (Adam, Meldrum etc. Co. v. Stewart, 240.)

3. **CHATTEL MORTGAGES—SALE BY MORTGAGOR.**—If property under a chattel mortgage is sold by the mortgagor without authority of the mortgagee, the latter may either disavow the sale and retake the property, or he may ratify it and sue the mortgagor for the proceeds. (Burke v. First Nat. Bank, 447.)

CLEARANCE CARD.

See Master and Servant; Slander.

COMBINATIONS AGAINST EMPLOYEES.

See Master and Servant, 5.

CONCEALED WEAPONS.

1. **CONCEALED WEAPONS.—A TRAVELER,** to come within the exemption of a statute prohibiting the carrying of concealed weapons, is a person traveling at least such a distance as takes him among strangers, with whose habits, conduct, and character he is not acquainted, where unknown dangers may exist, from which there may be a necessity to protect himself. (State v. Smith, 205.)

2. **CONCEALED WEAPONS—TRAVELERS.**—One who goes from his home by rail, a distance of fifteen miles, in an adjoining county to attend a political meeting, is not a traveler entitled to

carry concealed weapons, within the meaning of the Indiana statutes. (*State v. Smith*, 205.)

See Criminal Law, 1.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW—TITLE OF ACT.**—If but one general and comprehensive subject is contained in a statute, and all its provisions are germane to that subject, the statute is not unconstitutional as "containing more than one subject, which shall be clearly expressed in the title." (*Farm Investment Co. v. Carpenter*, 918.)

2. **CONSTITUTIONAL LAW—TITLE OF ACT.**—While it serves no useful purpose to embrace in the caption of a statute anything but the general subject of the act, a statement of the subsidiary means and methods to be pursued in attaining the end or purpose of the law does not make the title bad. (*Isenhour v. State*, 228.)

3. **CONSTITUTIONAL LAW—TITLE OF PURE FOOD ACT.**—A statute forbidding the manufacture and sale of adulterated food, drugs, and drinks, defining such articles, prescribing the duties of the state board of health in relation thereto, and declaring penalties for the violation of the law, is not violative of the constitutional requirement that every act shall embrace but one subject, which shall be expressed in its title. (*Isenhour v. State*, 228.)

4. **CONSTITUTIONAL LAW—TITLE OF ACT.**—"An act providing for the supervision and use of the waters of the state," providing for the adjudication of such right of use by the state board of control, contains but one general subject, which is clearly expressed in its title. (*Farm Investment Co. v. Carpenter*, 918.)

5. **CONSTITUTIONAL LAW.—IN CONSTRUING STATUTES** all reasonable doubts must be resolved in favor of their constitutionality. (*State v. Standard Oil Co.*, 449.)

6. **THE CONSTITUTIONALITY OF A STATUTE WILL BE UPHOLD**, unless its repugnance to the constitution is so manifest as to remove all reasonable doubt. (*Isenhour v. State*, 228.)

7. **CONSTITUTIONAL LAW.**—Statutes must receive every presumption in favor of their validity, and are not to be overthrown by courts, unless clearly unconstitutional. (*Farm Investment Co. v. Carpenter*, 918.)

8. **THE CONSTRUCTION OF THE CONSTITUTION AND STATUTES OF A STATE BY ITS SUPREME COURT** is binding on the courts of other states. (*Kulp v. Fleming*, 611.)

9. **CONSTITUTIONAL LAW—STATUTORY CONSTRUCTION.** The Vermont statute, discriminating against the agents of firms organized under the laws of other states, refers to such firms irrespective of the residence of their members. (*State v. Cadigan*, 714.)

10. **CONSTITUTIONAL LAW.—THE EQUAL PROTECTION** of the law means the protection of equal laws. (*State v. Cadigan*, 714.)

11. **CONSTITUTIONAL LAW.—THE RIGHT OF PRIVATE CONTRACT** is no small part of the liberty of a citizen, and the usual and most important function of courts is rather to maintain and enforce contracts, than to enable the parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare. (*Russell v. Pittsburgh etc. Ry. Co.*, 214.)

12. **THE CONSTITUTION GUARANTEES THE PROTECTION OF A RIGHT** rather than the redress of a wrong. (*Stearns v. City of Barre*, 721.)

13. **CONSTITUTIONAL LAW—DENIAL OF REMEDY.**—Although a statute may change the remedy or the form of procedure, attach conditions precedent to its exercise, and abolish old and substitute new remedies, it cannot deny a remedy entirely. (*Mattson v. Astoria*, 687.)

14. **CONSTITUTIONAL LAW—DENIAL OF REMEDY—INJURY FROM DEFECTIVE STREET.**—A city charter giving to the municipal council control of the streets, and providing that neither the city nor any member of the city council shall be held liable for any damage resulting from any defective street, thus denying any remedy for the negligence of the council, is void, as being in conflict with a constitutional guaranty to every person of a remedy by due course of law for any injury done him. (*Mattson v. Astoria*, 687.)

15. **CONSTITUTIONAL LAW.—THE SEIZURE OF A PERSON'S PRIVATE PAPERS, TO BE USED IN EVIDENCE** against him, is equivalent to compelling him to be a witness against himself. (*State v. Slamon*, 711.)

16. **CONSTITUTIONAL LAW—SEIZURE OF PAPERS.**—It is a violation of the declaration of rights respecting searches and seizures for an officer, while searching one's person under a search-warrant for stolen goods, to take from it, against the party's will, a letter written to him. (*State v. Slamon*, 711.)

17. **CONSTITUTIONAL LAW.—A STATUTE THAT DISCRIMINATES BETWEEN AGENTS** of firms organized under the laws of the state and agents of firms organized under the laws of other states, making the act of the latter unlawful, while the act of the former in the same circumstances would be lawful, contravenes the constitutional provisions securing to all the equal protection of the laws. (*State v. Cadigan*, 714.)

18. **CONSTITUTIONAL LAW.—THE RIGHT TO CONTINUE TO PRACTICE A CALLING OR PROFESSION** is subject, where the pursuit concerns in a direct manner the public health and welfare, and is of such a character as to require a special course of study, training, or experience to qualify one to pursue it with safety to the public interest, to the power of the legislature to enact reasonable regulations to protect the public against evils which may result from incapacity and ignorance. (*State v. Gravett*, 605.)

19. **CONSTITUTIONAL LAW—OSTEOPATHY, FORBIDDEN DISCRIMINATION AGAINST THE PRACTICE OF.**—There is no authority to discriminate against any school of medicine. A statute requiring persons who practice osteopathy to hold a diploma from a regularly chartered and legally constituted school, wherein a course of instruction requires at least four terms of five months each, in four separate years, and also to pass an examination satisfactory to the medical board of registration on specified subjects, but which does not require a like duration of study of persons practicing the regular school of medicine, nor any requirement concerning the school itself, except that it be a legally chartered medical institution in good standing, undertakes to impose an unreasonable discrimination, and is, therefore, void. (*State v. Gravett*, 605.)

20. **CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.**—A provision of a pure food law that within ninety days after its passage the state board of health shall adopt meas-

ures to facilitate its enforcement, and prepare rules regulating standards, defining adulterations, and declaring methods of collecting and examining foods and drugs, is not a delegation of legislative power. (*Isenhour v. State*, 228.)

21. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER.—While the legislature may require the owners of factories and workshops to put their buildings in proper condition as to sanitation, and may require them to provide reasonable safeguards against danger for the operatives, it cannot delegate the power to determine as to whether and how these things shall be done or not done to the arbitrary decision of any individual or executive officer. Such delegation of power is authority to make a law for the individual, and to enforce special rules of conduct in particular cases, which, being arbitrary, special legislation is unconstitutional and void. (*Schaezlein v. Cabaniss*, 122.)

See Adulteration of Food; Appeal and Error, 5; Corporations, 11; Criminal Law, 6, 7; Unknown Owners, 4; Waters and Water-courses, 15-26.

CONTEMPT.

1. CONTEMPT.—An attempt to bribe a witness in the presence of the court is a criminal contempt. (*Fisher v. McDaniel*, 971.)

2. CONTEMPT—NOTICE.—ONE WHO APPEARS AND DEFENDS against contempt proceedings need not be served with notice to show cause therein. (*Ex parte Miller*, 49.)

3. CONTEMPT PROCEEDINGS MAY BE ENTERTAINED, though the equities of the cause have not been determined. (*Ex parte Miller*, 49.)

4. CONTEMPT.—AN ATTEMPT TO BRIBE A WITNESS, either in the presence of the court, or so near thereto as to interfere with its orderly procedure, is a contempt of court. (*Fisher v. McDaniel*, 971.)

5. CONTEMPT IN PRESENCE OF COURT, WHAT IS.—An attempt to bribe a witness in or near the courthouse building, although on a different floor from that on which the court is in session, is a contempt committed in the presence of the court. (*Fisher v. McDaniel*, 971.)

6. CONTEMPT—INDICTABLE ACT—JURISDICTION.—If an act is a contempt of court, the fact that it is also indictable as a criminal offense does not oust the jurisdiction of the court to punish the offender as for a contempt. (*Fisher v. McDaniel*, 971.)

7. CONTEMPT—INDICTABLE ACT—JURISDICTION.—A statute making an attempt to bribe a witness a criminal offense does not deprive the court of jurisdiction to punish such act as a contempt. (*Fisher v. McDaniel*, 971.)

8. CONTEMPT—CRIMINAL ACT—APPLICATION OF STATUTE.—Statutes empowering the court in all cases of conviction, when a fine is imposed, to order the accused committed to jail and prescribing the rate for determining the period of imprisonment for the nonpayment of the fine, are applicable to a criminal contempt committed by attempting to bribe a witness in the presence of the court. (*Fisher v. McDaniel*, 971.)

See Injunctions, 5, 6.

CONTRACTS.

1. **CONTRACT FOR PERMANENT EMPLOYMENT, WHAT IS AND WHEN VALID.**—The agreement of an employer in consideration of a release by an employé, in whole or in part, of a claim for damages, that the former will employ the latter and give him a steady job so long as he gives satisfaction, is not void for want of mutuality. On the side of the employé it is an executed contract, not of the service contemplated, but as to the opportunity to serve and receive wages therefor. (*Rhoades v. Chesapeake etc. Ry. Co.*, 826.)

2. **AGREEMENT, DISCHARGE OF EARLIER BY LATER.**—If two agreements of different dates, between the same parties, and covering the same subject matter, are inconsistent, the earlier is discharged by the later, but if, though they differ in terms, their legal effect is the same, the second is merely a ratification of the first, and the two must be construed together. (*Rhoades v. Chesapeake etc. Ry. Co.*, 826.)

3. **CONTRACT FOR PERMANENT EMPLOYMENT—DAMAGES FOR VIOLATION OF.**—If one who has contracted for permanent employment is "discharged without cause, he may treat the contract as absolutely broken by the master, and, in an action thereon, recover the full value of the contract to him at the time of the breach, including all that he would have received in the future as well as in the past if the contract had been kept, less any sum he might have earned already or might thereafter earn in other service, as well as the amount of any loss the defendant sustained by the loss of his services without the master's fault." (*Rhoades v. Chesapeake etc. Ry. Co.*, 826.)

4. **A CONTRACT REPROBATED BY PUBLIC POLICY** is illegal, though in that particular instance no actual injury has resulted to the public. (*Tarbell v. Rutland R. R. Co.*, 734.)

5. **COURTS WILL NOT ENFORCE CONTRACTS MADE FOR THE PURPOSE OF VIOLATING STATUTES**, but will hold them inoperative and void. (*Tarbell v. Rutland R. R. Co.*, 734.)

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Deeds and Conveyances.

CORPORATIONS.

1. **SUBSEQUENT CREDITORS CANNOT COMPLAIN OF A DISPOSITION OF PROPERTY BY A CORPORATION**, unless such disposition was made with intent to hinder, delay, or defraud them, and actually had that effect. (*Wilson v. Stevens*, 86.)

2. **DIRECTORS OF A CORPORATION MAY BE LIABLE TO STOCKHOLDERS** for mismanagement of the business, or waste of corporate assets. (*Wilson v. Stevens*, 86.)

3. **DIRECTORS OF A CORPORATION ARE NOT LIABLE TO ITS CREDITORS** merely because they have mismanaged and wasted assets, but only when there has been actual fraud. (*Wilson v. Stevens*, 86.)

4. AN INSOLVENT CORPORATION MAY DISPOSE OF ITS PROPERTY THE SAME AS AN INSOLVENT INDIVIDUAL; hence a preference which is proper in the case of an individual, is not illegal in the case of a corporation. (*Wilson v. Stevens*, 86.)

5. CORPORATIONS—TRUST FUND.—ASSETS of an insolvent corporation are held in trust for its creditors, whose claims are prior and superior to those of stockholders. (*Vermont Marble Co. v. Declez Granite Co.*, 143.)

6. CORPORATIONS—LIABILITY FOR UNPAID SUBSCRIPTIONS TO STOCK.—Debts due to a corporation constitute a portion of its assets and may be reached by creditors. Among these are unpaid subscriptions to stock which may be collected by creditors when the corporation itself has released them or in some way deprived itself of that right. (*Vermont Marble Co. v. Declez Granite Co.*, 143.)

7. CORPORATIONS—BASIS OF CREDIT—LIABILITY OF STOCKHOLDERS.—As to creditors, a corporation is presumed to have sought credit upon its stated capital stock at its par value, either actually paid in or due from stockholders, and as between them and creditors the rights of the latter cannot be defeated by any contract between the corporation and its stockholders, or by any device short of actual payment of the par value of such stock. Public policy requires that the fact whether a creditor did trust the corporation on the basis of its supposed capital stock, at par value, should not be inquired into. (*Vermont Marble Co. v. Declez Granite Co.*, 143.)

8. CORPORATIONS—INSOLVENCY—LIABILITY OF STOCKHOLDERS.—A stockholder in an insolvent corporation is liable to its creditors for the full par value of his stock, though he has received for a sum less than its par value stock purporting to be fully paid, under an agreement with the corporation to pay less than its par or face value. (*Vermont Marble Co. v. Declez Granite Co.*, 143.)

9. CORPORATIONS—STOCK—CALLS FOR PAYMENT—STATUTE OF LIMITATIONS.—An original call for payment of subscriptions on stock amounting to one-fifth of their par value does not set the statute of limitations in motion as against subsequent calls for the remainder of the par value made by creditors of the corporation. (*Vermont Marble Co. v. Declez Granite Co.*, 143.)

10. CORPORATIONS—TRANSFER OF STOCK.—The transfer of stock by an original stockholder is not sufficiently proved to avoid liability for unpaid calls by evidence that a third person asked to have the stock transferred on the corporation books to a certain transferee, which was not in fact done, there being no evidence that such transferee accepted or authorized the transfer. (*Vermont Marble Co. v. Declez Granite Co.*, 143.)

11. CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT. A PRIVATE CORPORATION IS A "PERSON" within the meaning of the fourteenth amendment to the constitution of the United States, but the provision of that amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, does not prohibit a state from requiring "for admission within its limits of a corporation of another state such conditions as it chooses." (*Floyd v. National Loan etc. Co.*, 805.)

12. STOCK CERTIFICATES ARE VOID IN THE HANDS OF AN INNOCENT HOLDER if they were issued on the surrender of other certificates issued without any consideration in money or

property, and the statutes of the state declare that stock so issued is void. The corporation cannot be estopped from denying the validity of such stock. (First Ave. Land Co. v. Parker, 841.)

13. **ESTOPPEL CANNOT CREATE CAPITAL STOCK OF A CORPORATION** which the law does not permit to exist, as where it is in defiance of a statute declaring that stock issued without consideration is void. (First Ave. Land Co. v. Parker, 841.)

14. **CORPORATIONS.—FOR ISSUING VOID CERTIFICATES OF STOCK** a corporation is liable to any purchaser thereof in good faith for the damages sustained by him. (First Ave. Land Co. v. Parker, 841.)

15. **CORPORATIONS.—THE SECRETARY OF A CORPORATION AND HIS SURETIES** are answerable to it for damages sustained by it for his issuing void certificates of stock, but the existence of such damages cannot be assumed unless it is affirmatively shown that such certificates were issued to purchasers who relied on the false recitals therein. (First Ave. Land Co. v. Parker, 841.)

16. **CORPORATION.—A CONSTITUTIONAL PROVISION IS NOT SELF-EXECUTING** which declares that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." (Kulp v. Fleming, 611.)

17. **CORPORATIONS — STATUTE CREATING LIABILITY AGAINST STOCKHOLDERS.**—If the constitution of the state declares that dues from corporations shall be secured by the individual liability of stockholders to an additional amount equal to the stock owned by them, a state statute providing that "no stockholders shall be liable to pay debts of a corporation beyond the amount due on his stock and an additional amount equal to the stock owned by him," must be interpreted as intended to comply with the constitutional mandate, and as creating a personal liability against stockholders. (Kulp v. Fleming, 611.)

18. **CORPORATIONS—ENFORCEMENT IN ONE STATE OF THE PERSONAL LIABILITY OF STOCKHOLDERS ARISING IN ANOTHER.**—As the liability of stockholders imposed by the constitution and statutes of another state must be deemed contractual, it may be enforced in any other state, not as a matter of comity merely, but as a contract voluntarily entered into. (Kulp v. Fleming, 611.)

19. **STATUTE, INTERPRETATION BY COURT, WHEN INTENDED.**—A judgment of the supreme court of the state affirming a judgment against stockholders in corporations in actions against them based on their supposed personal liability under a statute must be regarded, though it does not so state in express terms, as interpreting that statute and affirming that liability exists under and because of it. (Kulp v. Fleming, 611.)

20. **CORPORATIONS.—THE LIABILITY OF STOCKHOLDERS ARISES UPON CONTRACT** where, before they become such, there is a statute declaring what is the personal liability of stockholders in corporations. (Kulp v. Fleming, 611.)

21. **CONVERSION—EVIDENCE.**—If a corporation sues for the conversion of a crop, and the defendant puts in evidence a lease from plaintiff to him of the land, upon which the crop is grown, evidence is admissible in rebuttal to show that the corporate offi-

cers executing the lease were intruders in office, and executed the lease without authority, and with knowledge of that fact by the defendant. (*Groveland Imp. Co. v. Farmers' Supply Co.*, 755.)

22. CORPORATIONS—INSPECTION OF BOOKS—MANDAMUS.—A stockholder in a corporation has the right to inspect its books, records, and journals, and mandamus against their legal custodian to compel the permission of inspection is the appropriate remedy of the stockholder upon refusal to allow him such inspection. (*Johnson v. Langdon*, 156.)

23. CORPORATIONS—RIGHT TO INSPECT BOOKS—DEFENSE.—Upon an application by mandamus by a stockholder to compel permission to inspect the books, records, and journals of the corporation, it is no defense that the objects and purposes of the inspection are improper, and that the petitioner desires to injure the business of the corporation. The shareholder is not required to show any reason or occasion for making the examination, nor can his right thereto be defeated by inquiry into his motives therefor. (*Johnson v. Langdon*, 156.)

24. CORPORATIONS, FOREIGN—JURISDICTION—INSPECTION OF BOOKS—MANDAMUS.—If a foreign corporation doing business within the state fails to keep therein its books as required by law, and its officer having the custody of such books is not within the reach of state process, mandamus will not lie to compel the inspection of such books, but if there are other books within the state and in the custody of the agent of the corporation therein, mandamus may issue in favor of a resident or nonresident stockholder, to compel permission to inspect such books. (*State v. North American Land etc. Co.*, 309.)

25. CORPORATIONS, FOREIGN—INSPECTION OF BOOKS—MANDAMUS.—The right of a stockholder in a foreign corporation to compel by mandamus permission to inspect its books is not affected by a provision in its charter or by-laws that differences between the corporation and its stockholders shall be submitted to arbitration. (*State v. North American Land etc. Co.*, 309.)

26. CORPORATIONS, FOREIGN—JURISDICTION OVER.—While state courts will not ordinarily entertain suits involving the exercise of visitorial powers over foreign corporations, nor undertake to regulate their internal management, yet if, in a particular case, the court acquires jurisdiction and is not only able to hear and determine, but also to enforce its judgment so as to do complete justice, it will exercise such jurisdiction, although the result may be to regulate the internal affairs of the corporation. (*State v. North American Land etc. Co.*, 309.)

27. CORPORATIONS, FOREIGN—RIGHT TO DO BUSINESS. A foreign corporation not engaged in commerce, or in the service of the United States, can do business in the state only upon the conditions imposed by its laws. (*State v. North American Land etc. Co.*, 309.)

28. CORPORATIONS, FOREIGN—JURISDICTION—SERVICE ON AGENT.—If a foreign corporation has complied with the law of the state by establishing an office therein and designating an agent upon whom process may be served, service upon such agent confers jurisdiction to hear and determine the case, irrespective of the citizenship of the plaintiff or the subject matter of the controversy. (*State v. North American Land etc. Co.*, 309.)

29. CORPORATIONS, FOREIGN—JURISDICTION.—If a foreign corporation accedes to the provisions of the state law as to ser-

vice, and accepts them as a condition upon which it may do business in the state, the court, by such service, acquires complete and perfect jurisdiction, and may render judgment in personam against the corporation which is entitled to full faith and credit in other jurisdictions. (State v. North American Land etc. Co., 309.)

30. CORPORATIONS, FOREIGN—NONCOMPLIANCE WITH LAW—VOID CONTRACT.—A contract made within the state by a resident thereof with a foreign building and loan association, which has not complied with the laws of the state authorizing it to do business therein, is void. The contracting parties cannot avoid compliance with the laws by stipulating that their contract shall be construed by the laws of some other state. (Henni v. Fidelity Bldg. etc. Assn., 519.)

31. CORPORATIONS, FOREIGN—NONCOMPLIANCE WITH STATE LAW—COMITY.—If it is against the settled policy of the state to permit foreign corporations to transact business therein without first complying with the requirements of its laws, judicial comity does not require that active aid be given to the enforcement of contracts made by such corporations, which interfere with and tend to frustrate such policy. (Henni v. Fidelity Bldg. etc. Assn., 519.)

32. CORPORATIONS, FOREIGN—ACTION TO OUST.—If a statute provides a civil action for ousting foreign corporations from the exercise of powers and privileges which they have criminally abused, such action is not an attempt to enforce the penalty provided by the statute for the commission of the criminal act. (State v. Standard Oil Co., 449.)

33. FOREIGN CORPORATIONS DO BUSINESS WITHIN THE STATE, NOT BY RIGHT, but by comity, and the state may, at pleasure, revoke the privilege granted by it to such corporation. (State v. Standard Oil Co., 449.)

34. CORPORATIONS, FOREIGN.—REVOCATION OF PERMISSION given to a foreign corporation to do business within the state is not the infliction of a penalty, nor the deprivation of a right. It is merely the cancellation of a license. (State v. Standard Oil Co., 449.)

35. CORPORATIONS, FOREIGN—COMPELLING TO FURNISH EVIDENCE AGAINST ITSELF.—An action under an "anti-trust" statute, by "Injunction, or other proper proceeding," to prohibit a foreign corporation from doing business in the state in contravention of such statute, is a civil action, both in substance and form. Therein the corporation may be compelled to furnish evidence against itself. (State v. Standard Oil Co., 449.)

36. CORPORATIONS, FOREIGN—EXCLUSION FROM STATE. INJUNCTION OR QUO WARRANTO may be employed to exclude a foreign corporation from the state, for committing an act denounced as criminal by its statutes. (State v. Standard Oil Co., 449.)

37. A FOREIGN CORPORATION HAS NO AUTHORITY TO DO IN A STATE OTHER THAN THAT OF ITS CREATION any act not permitted by the laws of such state to individuals generally. (Floyd v. National Loan etc. Co., 805.)

38. A FOREIGN CORPORATION CANNOT EXERCISE, IN WEST VIRGINIA, any greater or different rights, powers, and privileges than are conferred on domestic corporation. (Floyd v. National Loan etc. Co., 805.)

39. FOREIGN CORPORATIONS, IMPLIED POWERS OF IN OTHER STATES.—A corporation, if not forbidden by the laws of its

being, may exercise in a state other than that of its creation the general powers conferred by its charter, unless prohibited from doing so by the direct enactments of the latter state or by its public policy, to be deduced from the general course of legislation or from the settled decisions of its highest court. (*Floyd v. National Loan etc. Co.*, 805.)

40. FOREIGN CORPORATIONS.—A STATE MAY FORBID AND PREVENT A FOREIGN CORPORATION from carrying on business within its limits, and also from doing certain acts, and making certain contracts within its jurisdiction. The exceptions to this rule are corporations engaged in foreign or interstate commerce or employed in the business of the government of the United States. (*Floyd v. National Loan etc. Co.*, 805.)

41. FOREIGN CORPORATIONS — RULE OF COMITY IN FAVOR OF.—A corporation created in one state has no power to do business in another, except by the law of comity, but this rule of comity extends to, and is enforced by, the courts in every nation and every state of the Union until destroyed by the law-making power. (*Floyd v. National Loan etc. Co.*, 805.)

See Building and Loan Associations; Evidence, 3-5; Executors and Administrators, 8; Receivers.

COSTS.

COSTS IN EQUITY CASES, and the manner in which they are awarded are in the discretion of the trial court, and the decision there made cannot be reviewed on appeal, unless clearly wrong. (*Jones v. Conn.*, 634.)

COTENANCY.

1. A TENANT IN COMMON MAY MAINTAIN TROVER AGAINST HIS COTENANT AND THE LATTER'S LICENSEE from cutting and removing timber from the lands of the cotenancy and converting it to his exclusive use. (*Sullivan v. Sherry*, 890.)

2. TENANTS IN COMMON, NONJOINER OF.—Where timber has been cut and removed from lands of a cotenancy and converted to his sole use by a licensee of one of the cotenants, the cotenant thus granting the license need not be made a party to an action by the other cotenant to recover for the conversion. (*Sullivan v. Sherry*, 890.)

See Records; Mines and Mining, 1.

CRIMINAL LAW.

1. INFAMOUS CRIMES.—THE CRIMES OF ASSAULT AND OF CARRYING CONCEALED WEAPONS are not infamous. (*Smith v. State*, 47.)

2. INFAMOUS CRIMES.—IT IS NOT THE SEVERITY OF PUNISHMENT, but the nature of the offense, which creates legal infamy and disqualifies a witness. (*Smith v. State*, 47.)

3. INFAMOUS CRIMES.—THE TEST as to whether a crime is infamous is whether it shows such depravity in the perpetration, or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath. (*Smith v. State*, 47.)

4. INFAMOUS CRIMES.—PERSONS CONVICTED OF TREASON, FELONY AND THE CRIMEN FALSI were, at common law, rendered infamous, and were disqualified as witnesses in civil and criminal cases. (*Smith v. State*, 47.)

5. JURISDICTION—POWER OF COURT TO FINE AND IMPRISON.—Under statutes authorizing the court, in all cases of conviction when a fine is imposed, to order the offender committed to jail until the fine is paid, and prescribing the rate per day for determining the period of imprisonment for the nonpayment of the fine, the power of the court to order a person sentenced to pay a fine to be committed is not confined to cases where a fine only is inflicted, but also extends to cases where both imprisonment and fine are inflicted as a punishment. The latter sentence is not indeterminate. (*Fisher v. McDaniel*, 971.)

6. CRIMINAL LAW.—CONSTITUTIONAL PROVISIONS AS TO CRUEL AND UNUSUAL PUNISHMENT are aimed more at the form or character of the punishment than to its severity in respect to duration or amount. (*Fisher v. McDaniel*, 971.)

7. CRIMINAL LAW—CRUEL AND UNUSUAL PUNISHMENT. A punishment inflicted by a court for the commission of a crime should not be interfered with as cruel and excessive, except in very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment, and violate the judgment of reasonable people. (*Fisher v. McDaniel*, 971.)

8. IN A CRIMINAL CASE A CHARGE THAT GOOD CHARACTER may of itself raise a reasonable doubt so as to authorize an acquittal, when no such doubt would arise in the absence of such testimony, is erroneous. (*Eggleston v. State*, 17.)

9. CRIMINAL LAW—PRINCIPAL AND ACCESSARIES.—One indicted as a principal in a felony cannot be convicted as accessory before the fact, or, if indicted as an accessory, cannot be convicted as a principal. One indicted as principal in a burglary cannot be found guilty as such if he did not participate therein and only counseled and advised the commission of the crime. (*Sandage v. State*, 457.)

10. CRIMINAL LAW.—PLEA IN ABATEMENT, based on the facts that the accused had two preliminary examinations, and that upon one he was held for a lower grade of crime than upon the other, forming the basis for the charge upon which he is tried, is demurrable. (*Thompson v. State*, 453.)

11. CRIMINAL LAW—CUMULATIVE SENTENCES.—Special statutory power to impose cumulative sentences in two cases only implies the absence of such power in all other cases. (*Ex parte McGuire*, 105.)

DAMAGES.

See Railroads.

DAMS.

See Waters and Watercourses, 32-34.

DEEDS AND CONVEYANCES.

1. DEED—CONSIDERATION—PRIOR UNRECORDED INSTRUMENT.—The recital in a deed raises a rebuttable presumption of the payment of a valuable consideration, and the burden of

proof to show notice of an earlier made instrument not first recorded, or of an oral contract, rests upon the party claiming under the latter. (*Mullins v. Butte Hardware Co.*, 430.)

2. **CONVEYANCE—NOTICE OF VOID MORTGAGE.**—Although knowledge of a void mortgage is no notice to a grantee of any title thereunder in the mortgagee, yet it is notice to him of whatever right by way of remedy the mortgage may have by reason of the mortgage being void. (*Dietrich v. Hutchinson*, 698.)

3. **CONVEYANCE OF MINE—RECORD TITLE AS NOTICE.** If the record title to a mine shows the owners to be tenants in common without reference to separate surface interests, and C., one of the owners, conveys an undivided interest to M., who conveys it to H., who conveys it to D., and subsequently to the recording of the deeds to M. and to H., but prior to the recording of the deed to D., C. conveys another undivided interest, with a lot thereon, to N., D.'s grantee is not charged with constructive notice of N.'s rights by the record of his deed. N.'s occupancy of the lot as lessee for about a year previous to the grant to him does not change this rule. (*Mullins v. Butte Hardware Co.*, 430.)

See Homesteads; Husband and Wife; Records.

DEFICIENCY JUDGMENT.

See Mortgages, 10.

DETECTIVES.

See Evidence, 9.

DIVORCE.

See Benefit Societies; Marriage and Divorce.

DOGS.

See Animals, 3-8.

EASEMENTS.

1. **EASEMENT.—THE PRESUMPTION OF A GRANT CAN NEVER ARISE** where all the circumstances are perfectly consistent with the nonexistence of a grant. (*Jesse French Piano etc. Co. v. Forbes*, 71.)

2. **NO EASEMENT CAN BE ACQUIRED WHEN THE USE IS BY EXPRESS OR IMPLIED PERMISSION.** (*Jesse French Piano etc. Co. v. Forbes*, 71.)

3. **AN EASEMENT BY PRESCRIPTION IS CREATED** only by a user adverse to the owner of the estate over which the easement is claimed, under a claim of right, exclusive, continuous and uninterrupted, and with the knowledge and acquiescence of the same, for a period equal at least to that prescribed by the statute of limitations for acquiring title to land by adverse possession. (*Jesse French Piano etc. Co. v. Forbes*, 71.)

4. **EASEMENT IN PRIVATE ALLEY.—THE UNINTERRUPTED USE OF SWINGING BLINDS** on windows which open into a private alleyway is not such an adverse use of the alleyway as can ripen into a title by prescription. (*Jesse French Piano etc. Co. v. Forbes*, 71.)

5. **THE ENGLISH DOCTRINE OF ANCIENT LIGHTS.** that one may acquire, an easement in the unobstructed passage of light and air, has no sanction in American jurisprudence. (*Jesse French Piano etc. Co. v. Forbes*, 71.)

6. **EASEMENT—LOSS BY PRESCRIPTION.**—An easement, even if granted by deed, may be lost by nonuser, coupled with a use on the part of the owner of the servient estate adversely for a period of time sufficient, under the statute of limitations, to create the easement in the first instance. (*Jesse French Piano etc. Co. v. Forbes*, 71.)

EJECTMENT.

EJECTMENT—PLEADING.—A complaint in an action to quiet title alleging possession of the premises in the plaintiff, and title in fee in him, and that defendant claimed an estate or interest therein adverse to him, is sufficient to give the court jurisdiction of the subject matter, for the purpose of determining such claim. (*Kalb v. German Savings etc. Soc.*, 757.)

See Judgments, 19.

EMBEZZLEMENT.

1. **EMBEZZLEMENT.**—A CHARGE THAT THE DEFENDANT would not be guilty of embezzlement if he gave the money to another to change, and such other person kept it, is erroneous, since it omits reference to the secretion of the money. (*Eggleston v. State*, 17.)

2. **EMBEZZLEMENT—DISPOSITION OF MONEY.**—In a prosecution for embezzlement the state is not required to show what became of the money after it had been embezzled. (*Eggleston v. State*, 17.)

3. **EMBEZZLEMENT.—ONE WHO, AFTER ACQUIRING THE POSSESSION OF MONEY AS AGENT,** conceives the fraudulent intent of converting it to his own use, is guilty of embezzlement. (*Eggleston v. State*, 17.)

4. **EMBEZZLEMENT—QUESTION FOR JURY.**—On a trial for embezzlement, it is for the jury to determine whether the defendant had the intent to fraudulently convert the money to his own use or to the use of another, or whether he fraudulently secreted it with the intent to convert it. (*Eggleston v. State*, 17.)

EMINENT DOMAIN.

1. **EMINENT DOMAIN—AMOUNT OF TAKING—PROCEDURE.**—A statute that leaves undetermined the amount of the taking under the power of eminent domain must provide for the determination a procedure that accords with the established principles of law. (*Stearns v. City of Barre*, 721.)

2. **EMINENT DOMAIN—EXTENT OF TAKING.—A STATUTE** authorizing a city to condemn property to provide for a water supply, which leaves the extent of the taking to the final determination of the officers of the municipality making the condemnation, is unconstitutional. (*Stearns v. City of Barre*, 721.)

3. **EMINENT DOMAIN.—THE NECESSITY OF THE TAKING** under the power of eminent domain is ultimately a judicial, and not a legislative, question. (*Stearns v. City of Barre*, 721.)

4. **EMINENT DOMAIN.—THE ASCERTAINMENT OF THE NECESSITY** of taking property under the power of eminent domain should precede or accompany the taking. A rule that permits land to be taken without proof of the right to do so, and casts upon the owner the burden of instituting proceedings to save his property, does not meet the spirit of the constitutional requirement. (*Stearns v. City of Barre*, 721.)

5. **THE RIGHT OF EMINENT DOMAIN** is an attribute of sovereignty existing independently of the constitution, but this does not take a provision incorporating the doctrine of eminent domain in the constitution out of the rules pertaining to constitutional construction and enforcement. (*Stearns v. City of Barre*, 721.)

EMPLOYÉS.

See Master and Servant; Slander.

ENTIRETIES.

See Husband and Wife.

EQUITY.

See Costs; Mistake.

ESTATES OF DECEDENTS.

See Advancements; Executors and Administrators.

EVIDENCE.

1. **EVIDENCE — JUDICIAL NOTICE — ABBREVIATIONS.**— Courts take judicial notice of the meaning of customary abbreviations of common words, including all conventional expressions or arbitrary signs that have passed into common use. (*Estate of Lake-meyer*, 96.)

1a. **MUNICIPAL CORPORATIONS — BOUNDARIES.** — JUDICIAL NOTICE may be taken of statutes creating municipal corporations, and of the extent of their limits as fixed thereby. (*Ex parte Wygant*, 673.)

2. **EVIDENCE.—A BOOK MADE BY A DECEASED PERSON** is not evidence in favor of his administrator to show the state of accounts between the deceased and another, where such book was not made as the business was carried on, but several years after it closed, unless the defendant calls for and uses part of it as evidence, in which event the whole writing or account must be received. (*Rowan v. Chenoweth*, 796.)

3. **EVIDENCE. — OFFICERS OF A CORPORATION ARE MERE AGENTS, AND THEIR DECLARATIONS** are binding upon it only when made in the course of, or connected with, the performance of their authorized duties. (*Whitney v. Wagener*, 351.)

4. **EVIDENCE.—THE DECLARATIONS OF AN AGENT CAN NOT BE RECEIVED** in a suit to which he is not a party to establish the alleged fact that he, and not his principal, is the owner of property in controversy. (*Whitney v. Wagener*, 351.)

5. **EVIDENCE — DECLARATIONS.—THE POSSESSION OF PROPERTY BY ONE AS AN OFFICER OR AGENT** of a corporation is not sufficient to render his declarations as to his ownership

thereof admissible against the corporation or those claiming through it. (*Whitney v. Wagener*, 351.)

6. EVIDENCE—PAPERS WRONGFULLY OBTAINED.—When papers are offered in evidence, the court can ordinarily take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try that question. (*State v. Slamon*, 711.)

7. EVIDENCE.—A PAPER TAKEN FROM ONE'S PERSON, in violation of his constitutional right of freedom from unlawful search and seizure, is not admissible in evidence against him. (*State v. Slamon*, 711.)

8. PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT THE WORD "DUEBILL," contained in a receipt, referred to a promissory note on which the action was brought. (*Andrews v. Robertson*, 870.)

9. EVIDENCE OF DETECTIVES—WEIGHT OF TESTIMONY. The testimony of a detective employed to hunt up evidence against the accused must be weighed with greater care than that given by disinterested witnesses. (*Sandage v. State*, 457.)

EXECUTIONS.

See Exemptions.

EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATORS—LOAN BY—LIABILITY OF BORROWER.—In the absence of fraud and collusion, one who borrows from an administrator money belonging to his intestate's estate, although such loan is made without an order of court, will not be treated as a trustee and held to an accounting at the instance of the beneficiaries. (*Wilson v. Stevens*, 86.)

2. ADMINISTRATORS—UNAUTHORIZED LOAN.—A BENEFICIARY OF A DECEDENT'S ESTATE MAY ADOPT an unauthorized contract made by the administrator, or he may repudiate it and hold the administrator liable. (*Wilson v. Stevens*, 86.)

3. ADMINISTRATOR'S CONTRACTS—ADOPTION.—AN ADMINISTRATOR DE BONIS NON who with full knowledge of all the facts elects to adopt an unauthorized loan made by a prior administrator, is bound thereby. He cannot accept the investment and also treat the loan as a devastavit. (*Wilson v. Stevens*, 86.)

4. EXECUTORS AND ADMINISTRATORS—POWERS OF FOREIGN EXECUTORS—SALE OF STOCK.—As against an ancillary administrator with the will annexed, the domiciliary executor appointed in another state has no power to sell and assign stock in a bank located in California, although such stock is regularly in his possession. (*Murphy v. Crouse*, 90.)

5. EXECUTORS AND ADMINISTRATORS—POWER TO SELL PERSONALTY.—The common-law rule that title to personalty wherever situated is in the domiciliary executor, who has the absolute right to dispose of it, does not prevail in California. (*Murphy v. Crouse*, 90.)

6. EXECUTORS AND ADMINISTRATORS—TITLE TO FOREIGN PERSONALTY.—If an ancillary administrator has been appointed in a foreign jurisdiction, the title to personalty having its situs in such foreign country or state is in the ancillary administrator. (*Murphy v. Crouse*, 90.)

7. EXECUTORS AND ADMINISTRATORS.—POWER OF A DOMICILIARY EXECUTOR TO ASSIGN PERSONALTY having its situs in another jurisdiction results from the common-law rule, that such property descends to the personal representative and not to the heir; such rule does not prevail in California. (Murphy v. Crouse, 90.)

8. ESTATES OF DECEDENTS — SITUS OF CORPORATE STOCK.—Certificates of stock belonging to a decedent for the purpose of administration constitute property belonging to him in the state where the corporation is organized, and it can be reached there, and there only, by his creditors. (Murphy v. Crouse, 90.)

9. ESTATES OF DECEDENTS.—THE LANDS OF A DECEDENT CANNOT BE SOLD to pay the costs of administration where he died without leaving any debts. (Carr v. Hull, 623.)

10. ESTATES OF DECEDENTS.—DECREE OF DISTRIBUTION—EQUITABLE RELIEF.—INTRINSIC FRAUD, by which a decree of distribution is obtained by false and perjured evidence upon issues within the case is not such fraud as equity may relieve against by setting aside, or in any manner interfering with, such decree. Extrinsic fraud, however, may form the basis for such relief. (Sohler v. Sohler, 98.)

See Judgments, 36, 37.

EXEMPTIONS.

1. EXEMPTIONS—OUT OF WHAT PROPERTY MAY BE CLAIMED.—An execution debtor, no matter what other property he may have, has a right to select and claim particular property as exempt up to the limit fixed by the statute. (Thibault v. Lennon, 657.)

2. EXEMPTIONS—HOW CLAIMED.—To secure the benefit of a statute of exemptions, the debtor must, by timely interposition, select and reserve such property as he claims to be exempt when the officer seeks to take it in satisfaction of his writ. (Thibault v. Lennon, 657.)

3. TRESPASSER AB INITIO.—An officer levying a writ of attachment, though he has a right to retain the property for a reasonable length of time to make an inventory and appraisement and to permit the defendant to claim his exemption, becomes a trespasser ab initio in unreasonably depriving him of the opportunity to make a selection of his exempt property or refusing to recognize his right to property clearly exempt. (Stern v. Riches, 892.)

EXPERT TESTIMONY.

See Witnesses, 3, 4.

FELLOW-SERVANTS.

See Master and Servant.

FENCES.

See Railroads.

FINES.

See Criminal Law, 5.

FIXTURES.

1. FIXTURES.—THERE IS NO GENERAL TEST FOR DETERMINING whether a chattel acquires the nature of realty by being affixed thereto. In each case regard must be had to the chattel itself, the injury that would result from its removal, and the intention in placing it upon the premises with reference to use or ornament. (*McFarlane v. Foley*, 264.)

2. FIXTURES—INTENTION.—WHETHER AN ARTICLE annexed to the freehold becomes a part thereof is primarily a question of intention. And such intention is to be inferred from the nature of the article, the relation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation is made. (*McFarlane v. Foley*, 264.)

3. FIXTURES — MECHANIC'S LIEN.—CHANDELIERS attached to a building become a part of the realty, when such is the intention of the owner of the building, and a contractor who furnishes and puts them in may enforce a mechanic's lien therefor. (*McFarlane v. Foley*, 264.)

4. FIXTURES — SEVERANCE. — AN OWNER OF REALTY may, by a proper contract of sale, sever a fixture, thereby converting it into a personal chattel, without at the time physically detaching such fixture from the realty. (*Johnston v. Philadelphia Mortgage etc. Co.*, 75.)

5. FIXTURE — WRITTEN CONTRACT OF SALE.—IN ORDER TO CONVEY THE LEGAL TITLE to a fixture which is not severed from the realty, the contract must be in writing and be executed with the same formality as a conveyance of the realty. (*Johnston v. Philadelphia Mortgage etc. Co.*, 75.)

6. FIXTURE—SALE—SUBSEQUENT MORTGAGE.—A verbal sale of a fixture not severed from the realty does not convey title as against a subsequent mortgage. (*Johnston v. Philadelphia Mortgage etc. Co.*, 75.)

7. FIXTURES ACTUALLY OR CONSTRUCTIVELY ANNEXED TO THE REALTY PASS BY A CONVEYANCE OR MORTGAGE of the freehold, where there is nothing to indicate a contrary intention. (*Johnston v. Philadelphia Mortgage etc. Co.*, 75.)

8. TRADE FIXTURES ERECTED BY OWNER.—The rules relating to trade fixtures erected by a tenant have no application to such fixtures when annexed by the owner of the realty. (*Johnston v. Philadelphia Mortgage etc. Co.*, 75.)

FOOD.

See Adulteration of Food.

FORFEITURES.

FORFEITURE NOT ENFORCEABLE BY PARTY IN FAULT.—One party cannot predicate a forfeiture upon an omission by the other which the conduct of the first brought about. (*Langnecker v. Trustees of Grand Lodge etc.*, 860.)

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES.—A JUDGMENT AGAINST A GRANTOR in a fraudulent conveyance is, in the absence of

fraud, conclusive evidence of the debt, in favor of the creditor, as against the fraudulent grantee. (*Comer v. Shehee*, 78.)

2. FRAUDULENT CONVEYANCES—PAYMENT BY GRANTEE—BURDEN OF PROOF.—If a fraudulent grantee undertakes to relieve himself from liability by showing payment to his grantor's creditors, the burden of proof is on him to show such payment, and that the debts discharged were subsisting, legal, bona fide demands against his grantor. (*Cottingham v. Greely Barnham Grocery Co.*, 58.)

3. FRAUDULENT CONVEYANCES.—A FRAUDULENT GRANTEE MAY RELIEVE HIMSELF FROM LIABILITY to the creditors of his grantor by paying to bona fide creditors a sum of money equal to the value of the property transferred to him, and it is immaterial that he was forced to pay by means of the process of attachment. (*Cottingham v. Greely Barnham Grocery Co.*, 58.)

4. A FRAUDULENT GRANTEE CANNOT, BY GARNISHMENT, be required to account to the creditors of his vendor for any greater sum than the value of the property acquired by him under the transfer to him. (*Cottingham v. Greely Barnham Grocery Co.*, 58.)

See Chattel Mortgages.

GARNISHMENT.

See Attachment and Garnishment.

HABEAS CORPUS.

1. HABEAS CORPUS.—Mere errors of law are not reviewable on habeas corpus. (*Fisher v. McDaniel*, 971.)

2. HABEAS CORPUS CANNOT BE USED for the correction of mere errors and irregularities at the trial. (*Williams v. Hert*, 203.)

3. HABEAS CORPUS—JURY TRIAL.—If one is convicted of petit larceny, a writ of habeas corpus for his release, on the ground that he was refused a jury trial, is properly denied. (*Williams v. Hert*, 203.)

4. HABEAS CORPUS—UNCONSTITUTIONAL ORDINANCE.—A judgment of conviction of a competent court is not void because the statute or ordinance that defines the offense is unconstitutional, and the refusal to quash a writ of habeas corpus for the release of the defendant is error. (*Koepke v. Hill*, 161.)

5. CRIMINAL LAW—CUMULATIVE SENTENCES—HABEAS CORPUS.—If a prisoner serving a term of imprisonment for a misdemeanor is sentenced to the state prison upon conviction of a felony, his imprisonment in the county jail thereafter for the misdemeanor is unlawful, and upon habeas corpus he must be remanded to the custody of the sheriff for imprisonment in the state prison forthwith. (*Ex parte McGuire*, 105.)

6. HABEAS CORPUS LIES NOT ONLY WHEN THE PRISONER IS ENTITLED TO HIS LIBERTY, but also when he is held by one person when another is entitled to his custody. (*Ex parte McGuire*, 105.)

HEALTH OFFICER.**HEALTH OFFICER--POWER TO DESTROY PROPERTY.**

In the absence of some regulation made, or special authority conferred by the board of health, the court, or the corporate authorities, a city health officer as such has no authority to destroy property, whether infected or not. (*Barrett v. City of Mobile*, 54.)

See *Trover*.

HOMESTEADS.

1. THE HOMESTEAD ACT IS TO PROTECT THE HUSBAND as well as the wife. (*Martin v. Harrington*, 704.)

2. A HUSBAND'S SOLE DEED OF A HOMESTEAD is void, and is not rendered in any way effective by the subsequent death of his wife leaving him without family. (*Martin v. Harrington*, 704.)

3. MORTGAGES—SUBSEQUENT DECLARATION OF HOMESTEAD.—A declaration of homestead upon community property by the husband filed after the recording of a deed thereof intended as a mortgage is subject to such mortgage. The exclusion of such declaration from evidence in an action to foreclose the mortgage is not in prejudice of the wife of the homestead declarant. (*Loewenthal v. Coonan*, 115.)

4. HOMESTEAD—DEATH OF SPOUSE.—A homestead right is not necessarily terminated by the dissolution of the community, caused by the death of the husband or wife. (*Lyons v. Andry*, 299.)

5. HOMESTEADS—CHANGE OF RESIDENCE — ABANDONMENT.—If a person claiming a homestead has actually resided up n the property with his family, the fact of a change of residence to some other place does not, of itself, cause a forfeiture of the homestead right, though it may be evidence of an intention to abandon, and, coupled with other facts, may establish it. (*Lyons v. Andry*, 299.)

6. HOMESTEADS — ABANDONMENT—CHANGE OF RESIDENCE from a homestead to an adjoining place, if the result of calamity, and not a voluntary act, is not proof of an abandonment of the homestead. (*Lyons v. Andry*, 299.)

7. HOMESTEAD RIGHTS MUST BE UPHELD unless clearly shown to have been abandoned. Continued personal occupation of the premises is not essential to the preservation of the right, and how long an absence will work a forfeiture must depend upon the circumstances of each particular case. (*Lyons v. Andry*, 299.)

8. HOMESTEADS—HEAD OF FAMILY—DUTY TO SUPPORT CHILD.—A daughter eighteen years of age living with her father and rendering him her services is dependent upon him for support, though able to earn her own living, and entitles him to a homestead right. (*Lyons v. Andry*, 299.)

9. HOMESTEAD—GOVERNMENT LAND.—WHEN A PATENT issues to one who has previously made a homestead entry upon government land, it relates back, for all purposes, to the time of the original entry. (*Northern Pacific Ry. Co. v. Townsend*, 342.)

See *Adverse Possession*, 8.

HOMICIDE.

1. HOMICIDE—SELF-DEFENSE—THREAT OF EXPOSURE OF UNNATURAL CRIME.—The occupant of a dwelling may lawfully kill, as a necessary measure of defense, a person who attempts to break and enter therein with intent to obtain money from such occupant by taxing him with the commission of an infamous offense against nature, and threatening to expose him to public reprobation and contempt, even though he divines the purpose of such entry, or has notice of it. (*Thompson v. State*, 453.)

2. HOMICIDE—SELF-DEFENSE.—Whether the accused was under an apparent necessity of killing his assailant, and whether the killing was prompted by such necessity or by other motives, are questions to be determined by the jury. (*Palmer v. State*, 910.)

3. HOMICIDE—SELF-DEFENSE—ASSAULT IN DOMICILE.—A person assaulted in his own house need not retreat, although he can do so without increasing his own danger, before he may lawfully resist, even to the taking of the life of his assailant. In such case he is not required to retreat to avoid the necessity of killing his assailant. (*Palmer v. State*, 910.)

4. HOMICIDE—SELF-DEFENSE—ASSAULT IN DOMICILE. One who starts out upon an expedition which involves a felonious assault upon another in his own house takes his life in his hand, and the right to take it from him only upon the apparent necessity which he himself may create. The person so assaulted has the right to defend himself and to pursue his adversary until he has freed himself from all danger. (*Palmer v. State*, 910.)

5. HOMICIDE—SELF-DEFENSE.—A PERSON ASSAULTED UPON HIS OWN GROUNDS, without provocation, by a person armed with a deadly weapon and apparently seeking his life, is not obliged to retreat, but may stand his ground and defend himself with such means as are within his control, and to the extent necessary to save his life. (*Palmer v. State*, 910.)

6. HOMICIDE—SELF-DEFENSE—ASSAULT IN DOMICILE. Every person has a right to pursue his peaceful avocations in his own house and about his own premises, unmolested by threats, or violence, or unlawful interference by any other person. If, while pursuing these avocations, he is violently attacked in a manner indicating a purpose to perpetrate a known felony upon him, such as murder, mayhem, or the like, he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. (*Palmer v. State*, 910.)

7. CRIMINAL LAW—DEFENSE OF DOMICILE.—A man may defend his domicile, even to the extent of taking life, if actually or apparently necessary to prevent the commission of any felony therein. Such right of defense is not limited to the case of an assault with intent to take the life of the inmate, or of doing him great bodily harm. (*Thompson v. State*, 453.)

HUSBAND AND WIFE.

1. A WIFE IS NOT GUILTY OF LACHES IN FAILING TO ASSERT HER RIGHT TO LAND purchased with her money, the title to which stands in her husband's name, where she had no knowledge that the title was in him, and he never asserted any ownership of the land. (*Haney v. Legg*, 81.)

2. MARRIED WOMEN — ENTIRETIES — TRUST DEED.—An instrument, executed by a husband and wife, conveying an estate

held by them by entireties to a third person to dispose of and apply the proceeds on the liabilities of the husband, is an absolute deed of trust, and not, on her part, a contract of suretyship. (*Rogers v. Shewmaker*, 274.)

3. **MARRIED WOMEN—ENTIRETIES—DISPOSAL OF PROCEEDS.**—A married woman may, her husband joining in the conveyance, convey an estate held with him by entireties, and, with his consent, apply the proceeds to his debts or to any other purpose. (*Rogers v. Shewmaker*, 274.)

4. **MARRIED WOMEN—TRUST DEED, SETTING ASIDE.**—If a husband and wife convey by a trust deed an estate held by them by entireties, the trustee to sell the property and apply the proceeds on the liabilities of the husband, and the trust is executed, a suit to recover the property, after years of acquiescence, cannot be maintained, even if the deed is considered in the nature of a mortgage. (*Rogers v. Shewmaker*, 274.)

5. **MARRIED WOMAN'S CONVEYANCE.—WHEN A HUSBAND** has a freehold interest in his wife's realty by virtue of the marital relation, he must, to make her conveyance thereof good, be named in the deed as grantor. His executing the deed jointly with her is not enough. (*Dietrich v. Hutchinson*, 698.)

6. **MARRIED WOMAN'S CONVEYANCE.—A WIFE'S COMMON-LAW DISABILITY** in respect to conveying her interest in real estate not her separate property has not been removed in Vermont. (*Dietrich v. Hutchinson*, 698.)

7. **CONVEYANCE TO MARRIED WOMAN.—FOR REAL ESTATE TO BE THE SEPARATE PROPERTY** of a married woman, the deed to her must contain explicit words shutting out her husband from his marital rights therein. (*Dietrich v. Hutchinson*, 698.)

8. **A MORTGAGE BY A MARRIED WOMAN** of property in which her husband has a freehold interest is void, if his name does not appear therein as grantor, though he signs and acknowledges it. (*Dietrich v. Hutchinson*, 698.)

9. **A MARRIED WOMAN CANNOT CHARGE HER REAL ESTATE**, except in the way provided by statute. (*Dietrich v. Hutchinson*, 698.)

INFAMOUS CRIMES.

See Criminal Law.

INFANTS.

1. **INFANTS.—IN SO FAR AS A CONTRACT ON THE PART OF AN INFANT IS EXECUTORY**, he may always interpose his infancy as a defense to an action for its enforcement. (*United States Inv. Corp. v. Ulrickson*, 326.)

2. **INFANTS -- DISAFFIRMING MORTGAGE.—AN INFANT WHO VOLUNTARILY ASSUMES THE POSITION OF OWNER OF LAND**, as the representative of his father, solely for the purpose of raising funds to free the land from debt, the only consideration for the conveyance to him being his agreement to execute a mortgage for that purpose, cannot, upon becoming of age, disaffirm the mortgage and retain the land discharged from its encumbrances. (*United States Inv. Corp. v. Ulrickson*, 326.)

3. **INFANTS — DISAFFIRMING MORTGAGE.—AN INFANT WHO IN GOOD FAITH** assumes the ownership of land on the sole consideration that he execute a mortgage thereon for the pur-

pose of raising money to free it from debt, cannot, after becoming of age, retain the land and disaffirm such mortgage, where all the money realized therefrom has been used to free the land from encumbrances. (*United States Inv. Corp. v. Ulrickson*, 326.)

See Intoxicating Liquors; Process, 3.

INJUNCTIONS.

1. **INJUNCTION—DISCRETION IN GRANTING.**—The granting of a preliminary injunction is so largely a matter of discretion that it will be sustained upon appeal, where there has been a reasonable showing made in support of the application in the court below. (*Parrot Silver etc. Co. v. Heinze*, 386.)

2. **AN INJUNCTION AGAINST PROCEEDING FURTHER IN A SUIT**, which does not become operative until after a judgment in such suit has been rendered, is violated by the issuance of execution or a writ of possession thereon. (*Ex parte Miller*, 49.)

3. **INJUNCTION.—COURTS WILL NOT PERMIT DEFENDANTS TO EVADE RESPONSIBILITY** for violating an injunction by doing through subterfuge that which, while not in terms a violation, yet produces the same effect by accomplishing substantially that which they were enjoined from doing. (*Ex parte Miller*, 49.)

4. **THE VIOLATION OF THE SPIRIT OF AN INJUNCTION**, even though its strict letter may not have been disregarded, is a breach of the mandate of the court. (*Ex parte Miller*, 49.)

5. **INJUNCTION—VIOLATION OF.**—Where an injunction is not to take effect until a bond is executed, acts done between the time of granting the injunction and the execution of the bond, which would be violative of the writ if fully operative, do not constitute a breach of the injunction. (*Ex parte Miller*, 49.)

6. **INJUNCTION—BOND.**—In Alabama there can be no injunction, and consequently no contempt for its violation, until a bond has been given. (*Ex parte Miller*, 49.)

INSANE PERSONS.

CONTRACTS—SUBSEQUENT INSANITY.—Contracts or liabilities incurred by persons while sane may be enforced, although the person making the contract or incurring the liability has since become insane. (*Harrigan v. Harrigan*, 118.)

See Marriage and Divorce.

INSTRUCTIONS.

1. **JURY TRIAL — INSTRUCTIONS. — AN ADDITIONAL CHARGE MAY BE REFUSED**, even if correct, if a general charge covers the same subject. (*Wellston Coal Co. v. Smith*, 547.)

2. **JURY TRIAL—INSTRUCTIONS.**—"An instruction stating the law applicable to one theory of the case, and substantially covering all the facts upon which the correctness of such theory depends, is proper, if there is any evidence in the case tending to prove such facts, although it ignores other facts put in issue as part of another and different theory, which, if true, leads to a different conclusion and result, when another instruction has been given in the case covering such conflicting theory." (*Rhoades v. Chesapeake etc. Ry. Co.*, 826.)

3. **APPEAL—INSTRUCTIONS—ERROR WITHOUT INJURY.** Where the verdict of a jury is in accordance with the law, and the undisputed facts, no injury can result by the giving of, or the failure to give certain instructions. (*Johnston v. Philadelphia Mortgage etc. Co.*, 75.)

4. **INSTRUCTIONS CONTAINING INCONSISTENT AND ERRONEOUS STATEMENTS** of law are ground for reversal. (*Palmer v. State*, 910.)

5. **TRIAL.—EXCEPTIONS TO INSTRUCTIONS** and to the charge generally as given, at the first opportunity when they are read to the jury, is sufficient, especially when the instructions given for the state contain an erroneous statement of the law, and are directly antagonistic to those asked by the defendant. (*Palmer v. State*, 910.)

6. **INSTRUCTIONS, IF ERRONEOUS, ARE NOT CURED** by giving correct instructions. The jury is not required to choose between conflicting instructions. (*Thompson v. State*, 453.)

INSURANCE.

1. **INSURANCE, LIFE--ASSIGNMENT OF.**—Any person has a right to procure insurance on his own life and assign it to another not having an insurable interest therein, provided it is done in good faith and not by way of cover for a wager policy. (*Chamberlain v. Butler*, 478.)

2. **INSURANCE — REMOVAL OF PROPERTY.**—A condition that a policy insuring against loss by fire is to become void if any change takes place in the location of the property does not, on its breach, render the policy absolutely void, so that no recovery can be had thereon if a loss subsequently occurs at another place to which the insurer had stipulated that removal might be made, though, when so stipulating, he had no knowledge of the previous removal. (*Ohio Farmers' Ins. Co. v. Burget*, 596.)

3. **INSURANCE—ARBITRATION.**—A BOARD OF REFEREES provided for under a policy of fire insurance to arbitrate a question of loss is a quasi court, subject to the principles governing common-law arbitration. (*Christianson v. Norwich Union Fire Ins. Soc.*, 379.)

4. **INSURANCE — ARBITRATION — EVIDENCE.**—WHILE A BOARD TO ARBITRATE a loss by fire is allowed a certain liberality in acquainting itself with the circumstances surrounding the fire without the medium of witnesses, such board cannot seek evidence secretly, and determine the amount of loss by reason of such personal knowledge. (*Christianson v. Norwich Union Fire Ins. Soc.*, 379.)

5. **A BOARD OF FIRE ARBITRATORS MUST CONSTITUTE A BODY OF DISINTERESTED MEN**, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy. (*Christianson v. Norwich Union Fire Ins. Soc.*, 379.)

6. **INSURANCE — ARBITRATION — PROFESSIONAL REFEREES.**—A person is not bound by an award, where the arbitrators are guilty of misconduct, merely because he consented that professional arbitrators should act. (*Christianson v. Norwich Union Fire Ins. Soc.*, 379.)

See Benefit Societies.

INTEREST.

See Advancements, 2.

INTERSTATE COMMERCE.

1. INTERSTATE COMMERCE—MUNICIPAL LICENSE TAX.

If a company is engaged in manufacturing goods in one state and through its agent solicits orders in another state, from persons not regular merchants, upon which it transports the goods consigned to itself into the latter state, and they are there delivered by such agent, who collects the price, the goods are the subject of interstate commerce, and the agent is not subject to arrest for violating a municipal ordinance prohibiting him from selling goods to persons not regular merchants without first obtaining a license therefor. (*State v. Willingham*, 948.)

2. MUNICIPAL CORPORATIONS — ORDINANCES—LICENSE—INTERSTATE COMMERCE.—A municipal ordinance requiring any person selling goods, wares, or merchandise to take out a license therefor, unless he is a merchant paying an annual tax upon his goods, or a traveling agent selling exclusively by sample, or otherwise, to regular merchants, is void, as in conflict with interstate commerce as against an agent of a manufacturer in another state engaged in delivering the goods of the manufacturer and collecting the price upon orders solicited to persons not regular merchants. (*State v. Willingham*, 948.)

INTOXICATING LIQUORS.

MINORS, DEALING IN INTOXICATING LIQUORS WITH, WHAT IS.—If an adult, accompanied by a minor, applies to a seller of intoxicating liquors for liquor to be drunk at his expense for both himself and the minor, and the dealer thereupon furnishes it to be used by both, he is guilty of dealing or trafficking in intoxicating liquor with a minor. (*Nelson v. State*, 881.)

IRRIGATION.

See Waters and Watercourses.

JUDGMENTS.

1. JUDGMENTS—WHEN FINAL.—A decree, to be final, must be definite, certain, and capable of immediate enforcement, so that the subsequent proceedings are only the means of executing the decree. (*Parmelee v. Schroeder*, 466.)

2. JUDGMENTS, FINAL—RIGHT TO APPEAL.—A decree is not final and appealable until the court has finally determined and disposed of the entire controversy between the parties, so that nothing remains to be done except to ministerially execute its provisions in the court in which it is rendered. (*Parmelee v. Schroeder*, 466.)

3. JUDGMENTS—DOCKET OF—WHAT MUST SHOW.—The judgment docket must show the date "when docketed" and the particular court in which the judgment was rendered, in order for it to become a lien upon the real property of the judgment debtor. (*Western Sav. Co. v. Currey*, 660.)

4. JUDGMENT DOCKET MUST AFFORD DEFINITE AND RELIABLE INFORMATION, as it respects the court in which the judgment was rendered, the parties thereto, and the amount and time when rendered. (*Western Sav. Co. v. Currey*, 660.)

5. JUDGMENT DOCKET.—EACH COURT MUST KEEP a separate judgment docket, which must show on its face that it is the judgment docket of a particular court. (*Western Sav. Co. v. Currey*, 660.)

6. JUDGMENT DOCKET—IMPROPER RECORD.—A judgment docketed in a docket or record-book, unknown to the law providing for the docketing of judgments, is ineffectual to create a lien. (*Western Sav. Co. v. Currey*, 660.)

7. JUDGMENT DOCKET—PRESUMPTION OF PERFORMANCE OF OFFICIAL DUTY.—If a judgment docket does not show the date of docketing the judgment, as required by statute, there is no presumption that the clerk of the court properly docketed the judgment at the date of its rendition. (*Western Sav. Co. v. Currey*, 660.)

8. JUDGMENT DOCKET—CREATION OF LIEN.—Statutory provisions creating a lien by the docketing of a judgment are mandatory, and to be effectual must be substantially complied with. (*Western Sav. Co. v. Currey*, 660.)

9. JUDGMENTS—LIEN ON AFTER-ACQUIRED LANDS.—A judgment is a lien upon the after-acquired lands of the debtor under a statute providing that "lands and tenements within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered, but judgments by confession and judgments rendered at the same term at which the action is commenced shall bind such lands only from the day on which such judgments are rendered, and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution." (*Coad v. Cowlick*, 953.)

10. JUDGMENTS.—THE AFFIRMANCE OF A VOID JUDGMENT is also void as are also all proceedings to enforce the affirmed judgment by execution and sale. (*Ball v. Tolman*, 110.)

11. JUDGMENTS—REVIVOR—RES JUDICATA.—In a proceeding to revive a dormant judgment, every matter necessary to support any defense then possessed by the judgment defendant against the demands of the plaintiff on that cause of action is *res judicata* as having been litigated in the action wherein such judgment was obtained, and no objection can be urged or inquired into which goes behind the original judgment, unless directed to its validity. (*Stover v. Stark*, 460.)

12. A COURT CANNOT ENTER A JUDGMENT NOTWITHSTANDING A VERDICT, where the result is to deprive a litigant of the right to have the facts in a common-law issue determined by the jury instead of absolutely by the court. (*Marengo v. Great Northern Ry. Co.*, 369.)

13. JUDGMENT.—IF SERVICE OF SUMMONS IS MADE BY ONE NOT OF THE AGE required by statute, the judgment is not, for that reason, either void or subject to any attack, save by appeal. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

14. JUDGMENTS—PRESUMPTION—SERVICE.—If a judgment of a court of general jurisdiction recites that service of summons was duly made, it must be presumed that that fact appeared to the court by competent proof. (*Kalb v. German Sav. etc. Soc.*, 757.)

15. JUDGMENT.—THE AFFIDAVIT OF SERVICE OF SUMMONS, made by a private person, may, upon a direct attack on a judgment other than by appeal, be falsified by evidence aliunde the record. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

16. JUDGMENT — PRESUMPTION OF JURISDICTION.—WHEN AN ATTACK, other than by appeal, is made on the judgment of a court of general jurisdiction, the presumption is that jurisdiction was obtained of the person of the defendant provided it does not appear from the judgment-roll that he was without the jurisdiction of the court. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

17. JUDGMENT—PRESUMPTION OF JURISDICTION.—UPON DIRECT ATTACK by appeal, the presumption that a court rendering a judgment by default had jurisdiction of the person of the defendant does not obtain. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

18. JUDGMENTS—PRESUMPTIONS.—Every fact not negatived by the record is presumed in favor of the support of a judgment of a court of general jurisdiction. (*Kalb v. German Sav. etc. Soc.*, 757.)

19. JUDGMENTS — TRIAL AT CHAMBERS.—A judgment in ejectment is not void for the reason that it recites that the cause came on for hearing before a judge at chambers, when the trial of and judgment in such action at chambers is expressly authorized by statute. (*Kalb v. German Sav. etc. Soc.*, 757.)

20. A JUDGMENT BY A COURT HAVING JURISDICTION of the subject matter and of the parties, and keeping within the limits of its power, though it may be voidable, is never void. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

21. A JUDGMENT UNDER A STATUTE ERRONEOUSLY HELD CONSTITUTIONAL is not void. (*Koepe v. Hill*, 161.)

22. JUDGMENT—AMENDMENT.—PRIOR TO THE RETURN TO THE SUPREME COURT ON APPEAL, a trial court may amend its judgment in foreclosure so as to strike out all reference to a deficiency judgment, which had been included in the findings and judgment through inadvertence. (*United States Inv. Corp. v. Ulrickson*, 326.)

23. JUDGMENT — COLLATERAL ATTACK.—AN IRREGULARITY IN THE SERVICE of process on the defendant does not render the judgment vulnerable to a collateral attack. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

24. JUDGMENT—COLLATERAL ATTACK.—THE FACT THAT THE AFFIDAVIT OF SERVICE of summons does not state that the affiant was of the age required by statute does not render the judgment subject to collateral attack. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

25. JUDGMENT—COLLATERAL ATTACK.—UNLESS VOID on its face, or upon the inspection of the judgment-roll, a judgment cannot be successfully attacked collaterally. A voidable judgment is not open to such attack. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

26. JUDGMENT—COLLATERAL ATTACK.—THE PRESUMPTION OF JURISDICTION over the person of the defendant is conclusive, when a judgment is assailed collaterally, unless a lack thereof appears on the face of the judgment-roll. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

27. A JUDGMENT, WHEN COLLATERALLY ATTACKED, MUST BE TRIED by inspection of the judgment-roll, and by that alone. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

28. JUDGMENTS—COLLATERAL ATTACK.—Whenever a court is confronted with a question which it has a right to decide, its

erroneous judgment will not be subject to a collateral attack, irrespective of whether the mistake of law concerned the common, statutory, or constitutional law. (*Koepeke v. Hill*, 161.)

29. JUDGMENTS—COLLATERAL ATTACK—EVIDENCE.—In a collateral attack upon a judgment against a minor, evidence that no notice of the time or place of trial was given to his guardian ad litem is not admissible to oust the court of jurisdiction. (*Kalb v. German Sav. etc. Soc.*, 757.)

30. JUDGMENTS—COLLATERAL ATTACK.—If, after judgment in a suit to quiet title that defendant has no interest in certain lands, he brings an action seeking to have himself decreed a cotenant therein, such action is a collateral attack upon the prior judgment, and cannot be maintained. (*Kalb v. German Sav. etc. Soc.*, 757.)

31. PROCESS—DEFECT IN COLLATERAL ATTACK.—If a summons is defective in form only, a judgment based thereon is not open to collateral attack. (*Perry v. Gholson*, 685.)

32. JUDGMENT—VACATION—DILIGENCE.—A motion to vacate a judgment determining adverse claims to land is properly denied, where the party fails to show proper diligence in making it after he first learned of such judgment. (*McClymond v. Noble*, 354.)

33. JUDGMENTS—VACATION FOR FRAUD.—A judgment clearly shown to have been obtained by fraud, and which it would be against conscience to enforce, may, on the application of the defeated party and a showing of due diligence, be vacated and set aside. (*Secord v. Powers*, 474.)

34. JUDGMENTS—VACATION FOR PERJURY.—A judgment will not be vacated on the ground that it was obtained by fraud and perjury, unless the defeated party alleges and proves due diligence by him at the former trial, and that his failure to obtain a just judgment was not due to his own fault or negligence. (*Secord v. Powers*, 474.)

35. JUDGMENTS—VACATION FOR PERJURY.—The intentional production of false testimony may, in a proper case, justify the annulment of a decree or judgment resulting therefrom. (*Secord v. Powers*, 474.)

36. JUDGMENTS IN PROBATE—FRAUD—EQUITABLE RELIEF.—If a probate decree is obtained by fraud, equity may declare the person deriving title under it a trustee for the person defrauded. (*Sohler v. Sohler*, 98.)

37. JUDGMENTS IN PROBATE—EQUITABLE RELIEF—EXTRINSIC FRAUD.—If a widow, as executrix under her husband's will, devising property to his children, conspires with her son, who is not the son of the testator, to procure for him a share of such property as one of the testator's children, and files a petition naming such children and alleging that her son is one of them, and obtains a decree that such son is a child of the testator and entitled to a share of his estate without notice to the testator's children of the fraudulent proceeding, except such as they have by reason of the executrix being their testamentary trustee and guardian, though equity has no jurisdiction to set aside the probate decree, it may compel such son, as trustee for the children of the testator, to make conveyance to them of the share thus obtained by him, or, if a conveyance cannot be had, to account to them for the value thereof. (*Sohler v. Sohler*, 98.)

See Fraudulent Conveyances, 1; Statutes, 4.

JUDICIAL NOTICE.

See Evidence, 1.

JURISDICTION.

1. JURISDICTION IS ACQUIRED BY THE FACT OF SERVICE, and not by proof thereof. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

2. COMPLETE JURISDICTION INCLUDES not only the power to hear and determine the cause, but also power to enforce the judgment; and courts usually decline to entertain, or attempt to exercise, jurisdiction intended to be complete, if it fails to confer power to enforce the judgment which may be rendered. (*State v. North American Land etc. Co.*, 309.)

3. JURISDICTION ONCE ACQUIRED DOES NOT ALWAYS REMAIN, as the court may have authority at one time to proceed, and its authority may afterward be divested by statute. (*Ball v. Tolman*, 110.)

See Unknown Owners.

JUSTICES' COURTS.

JUSTICES' COURTS — EVIDENCE OF ISSUANCE OF SUMMONS.—In the absence of the original summons from the files in a justice's court, the docket entry required to be made by statute at the time of the issuance of the summons is sufficient proof of the date of its issuance. (*Perry v. Gholson*, 685.)

LACHES.

LACHES IS FOUNDED ON ACQUIESCENCE in the assertion of adverse rights, and unreasonable delay in not asserting one's own rights to the prejudice of the adverse party. (*Haney v. Legg*, 81.)

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—ASSIGNMENT OF LEASE.—COVENANT TO PAY RENT runs with the land, and the assignee of the lease, being in privity of estate with the landlord, is directly liable to him for the installments of rents accruing while the relation lasts. (*Hogg v. Reynolds*, 522.)

2. LANDLORD AND TENANT—PRIVITY OF ESTATE.—WHETHER ASSIGNMENT of the lessee's interest destroys the privity of estate subsisting between him and the landlord, and creates that relation between the landlord and the transferee, depends upon the estate demised and the estate transferred being precisely the same. (*Hogg v. Reynolds*, 522.)

3. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEE.—An assignee of a lessee's entire interest in a distinct portion of leased land is, as to such part, in privity of estate with the landlord, and liable to him for the entire rent therefor, but as to the portion of the land not covered by the assignment, there is no such privity, and the assignee is not liable for the rent therefor. (*Hogg v. Reynolds*, 522.)

4. LANDLORD AND TENANT—ASSIGNMENT OF LEASE—LIABILITY FOR RENT.—If a lessee assigns his whole estate in

all the demised premises, the assignee is liable to the lessor for the whole of the rent reserved in the lease. (*Hogg v. Reynolds*, 522.)

5. **LIEN ON PROPERTY NOT IN EXISTENCE—CREATION BY LEASE.**—A provision in a lease that all property belonging to the lessee that shall be on the leased premises, or shall be brought thereon by him during the term of the lease, shall be holden as security for the rent reserved, until it is paid, and shall be and remain a lien from year to year until payments for the rents for the entire term have been fully discharged and paid, is ineffectual to create a lien, legal or equitable, in favor of the landlord for rent due and in arrears on the crops grown thereafter on the leased premises, and on other property not in being at the time and thereafter brought on the leased premises by the lessee. (*Brown v. Neilson*, 525.)

6. **LIEN ON PROPERTY NOT IN BEING.—STIPULATIONS IN A LEASE** are ineffectual to create a lien, legal or equitable, in favor of the landlord for rents due and in arrears on crops thereafter grown upon the leased premises, or on property brought thereon by the lessee, but not in esse at the time of the execution of the lease. (*Brown v. Neilson*, 525.)

LARCENY.

1. **LARCENY.—ONE WHO, AT THE TIME HE RECEIVES MONEY**, entertains the fraudulent purpose of appropriating it to his own use, is guilty of larceny. (*Eggleston v. State*, 17.)

2. **LARCENY—DISHONEST GAMBLING.**—If a person stakes and loses his money at a dishonest game, not knowing it to be such, and in reliance upon a statement made by one of the persons conducting the game, that he stands an equal chance of winning, when he has none, the confederate conducting the game and taking his money is guilty of larceny. (*State v. Skilbrick*, 784.)

LATERAL SUPPORT.

LATERAL SUPPORT—RAILROADS.—If a railroad company, while excavating on its own land or right of way, removes the lateral support of adjoining land, to the injury thereof, it is liable to the owner thereof, without proof of negligence. (*Mosler v. Oregon Nav. Co.*, 652.)

LEASES.

See Landlord and Tenant.

LETTER OF RECOMMENDATION.

See Master and Servant; Slander.

LIBEL.

1. **IF A LIBELOUS PUBLICATION IS DIRECTED AGAINST A PARTICULAR CLASS OF PERSONS**, any one of that class may maintain an action upon showing that the words apply especially to him. (*Wofford v. Meeks*, 66.)

2. **LIBEL—OFFICERS.**—A PUBLICATION WHICH IMPUTES TO COMMISSIONERS the prostitution of the finances of the county, to the end of awarding contracts to persons of their political faith, and corruption and dishonesty, is libelous per se. (*Wofford v. Meeks*, 66.)

3. **LIBEL**.—**POSITIVE ASSERTION OF A CHARGE IS NOT NECESSARY** to constitute a writing libelous, but it may be made in the form of insinuation, allusion, irony, or question. (*Wofford v. Meeks*, 66.)

4. **LIBEL**.—**EDITORS HAVE FULL LIBERTY** to criticise the conduct and motives of public men, and measures and policy of government, but the discussion must be fair and legitimate, and must not asperse the character of public men and ascribe to them base and corrupt motives. (*Wofford v. Meeks*, 66.)

5. **IT IS LIBELOUS TO IMPUTE TO ANYONE HOLDING AN OFFICE** that he has been guilty of improper conduct in office, or has been actuated by wicked, corrupt, or selfish motives. (*Wofford v. Meeks*, 66.)

6. **LIBEL PER SE—DISHONESTY**.—If words employed in an alleged libelous publication impute dishonesty or corruption to an individual, they are actionable per se. (*Wofford v. Meeks*, 66.)

7. **LIBEL—INNUENDO**.—**IN DETERMINING WHETHER A PUBLICATION IS LIBELOUS PER SE**, the court is confined to the language employed in the publication, and cannot look to the innuendo alleged in the complaint. (*Wofford v. Meeks*, 66.)

See Slander.

LICENSE TAX.

See Interstate Commerce; Municipal Corporations, 1.

LIENS.

See Judgments, 8, 9; Landlord and Tenant, 5, 6.

LIMITATION OF ACTIONS.

1. **LIMITATIONS**.—**THE DEATH OF THE PARTY IN WHOSE FAVOR A CAUSE OF ACTION EXISTS** does not stop the running of the statute of limitations, though no representative of his estate is appointed. (*Rowan v. Chenoweth*, 796.)

2. **LIMITATIONS, STATUTE OF—DAMAGES FOR INJURIES, WHEN INTERMITTENT RATHER THAN PERMANENT**.—If a bridge is constructed across a stream, and afterward in time of freshets throws high water upon and caves in plaintiff's land and undermines his trees, such injury is intermittent rather than permanent, and the statute of limitations against an action to recover therefor does not commence to run from the time of erecting the bridge, but only from the date of the first injury. (*Eells v. Chesapeake etc. Ry. Co.*, 787.)

3. **A PRESCRIPTIVE RIGHT TO MAINTAIN A BRIDGE** in such a manner as may cause injury to a land owner cannot be sustained where there has been no acquiescence on his part, and whether there has been such acquiescence is a question of fact which must be submitted to the jury. (*Eells v. Chesapeake etc. Ry. Co.*, 787.)

4. **PRESCRIPTION—TIME OF COMMENCEMENT**.—Where a prescriptive right to maintain a bridge is insisted upon as a defense to an action to recover for injuries suffered by a land owner from its maintenance, the time upon which the prescriptive right is founded must be computed, not from the erection of the bridge, but

from the date when it has inflicted some appreciable damage to the plaintiff's property. (*Eells v. Chesapeake etc. Ry. Co.*, 787.)

See Adverse Possession; Prescription.

MALICIOUS PROSECUTION.

1. A RIGHT OF ACTION FOR MALICIOUS PROSECUTION does not accrue until the wrongful proceeding has been brought to a final determination in favor of the defendant or person accused. It is not, however, necessary that all proceedings required in the action to finally enforce the rights of the parties end before such right of action accrues, but only that the issues material to the question of the bona fides of the action shall have been tried and closed by a final judgment. (*Luby v. Bennett*, 897.)

2. PLEADING—DAMAGES, AMOUNT OF, WHEN NEED NOT BE ALLEGED.—In an action for the malicious prosecution of a civil action the complaint is not insufficient because it fails to declare that the plaintiff was damaged in some specified amount if damages to him are necessarily inferable from the facts stated. (*Luby v. Bennett*, 897.)

3. FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION no action can be sustained by the defendant, according to the English decisions, where neither his personal liberty nor his property is interfered with. (*Luby v. Bennett*, 897.)

4. AN ACTION CAN BE SUSTAINED FOR THE MALICIOUS PROSECUTION OF A CIVIL ACTION brought ostensibly for the purpose of winding up a partnership, and the purpose and effect of which were to take possession of the property from the defendant for the benefit of the plaintiff and to enable him, through the forms of law, to control such property, and thereby obtain title thereto. (*Luby v. Bennett*, 897.)

5. MALICIOUS PROSECUTION—APPEAL IN FORMER ACTION, WHETHER PLAINTIFF MUST NEGATIVE.—In an action for malicious prosecution it is not necessary for the plaintiff to allege that no appeal has been taken in the former action, or that the right to take it has terminated. If such taking or right exists, it is incumbent on the defendant in the action for malicious prosecution to plead it in his answer if he wishes to rely upon it as a defense. (*Luby v. Bennett*, 897.)

6. MALICIOUS PROSECUTION.—THE CONTINUANCE OF THE RIGHT OF APPEAL IN THE ORIGINAL ACTION does not prevent judgment therein in favor of the defendant from being such a final determination of the action as is necessary to support an action for malicious prosecution. (*Luby v. Bennett*, 897.)

MANDAMUS.

See Corporations, 22-24.

MARRIAGE AND DIVORCE.

DIVORCE—INSANE DEFENDANT.—A divorce may be granted against an insane defendant whose insanity did not exist at the time when the right to a divorce accrued. (*Harrigan v. Harrigan*, 118.)

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

1. MASTER AND SERVANT—EMPLOYÉ OR PASSENGER.—

If workmen engaged in constructing a trolley line are transported to and from their work in a conveyance furnished by the railway company, they are, while thus being transported, employés, and not passengers. (*Bowles v. Indiana Ry. Co.*, 279.)

2. MASTER AND SERVANT—EMPLOYÉ OR PASSENGER.—

If an employé is being carried by his employer in the conveyance of the latter to and from the work, the former is regarded, not as a passenger, but as an employé; though if he is being carried merely for his own convenience, pleasure, or business, he is a passenger. (*Bowles v. Indiana Ry. Co.*, 279.)

3. EVIDENCE, BURDEN OF PROOF.—

In an action by an employé who claims to have been discharged without sufficient cause "the burden is upon the defendant to show that the discharge was for good cause, and a verdict for the plaintiff should not be set aside, unless it is clearly wrong." (*Rhoades v. Chesapeake etc. Ry. Co.*, 826.)

4. MASTER AND SERVANT.—

An employer is not under any duty to give his discharged employé a clearance paper or statement showing whether the service or conduct of such employé was satisfactory, though without it he may be unable to obtain employment elsewhere. (*New York etc. R. R. Co. v. Schaffer*, 628.)

5. MASTER AND SERVANT—COMBINATIONS AGAINST

PARTICULAR CLASSES OF EMPLOYÉS.—Railway corporations may lawfully combine or agree with one another to refuse to continue in their employ persons who have been engaged in a war upon their interests, commonly called a strike. (*New York etc. R. R. Co. v. Schaffer*, 628.)

6. MASTER AND SERVANT—RISK ASSUMED BY SERVANT.—

Where a servant works in a blasting quarry for fourteen years with the same foreman, and all the time in the same character of service and having the same relation to each other, the servant assumes the risk of injury from the negligence of the foreman. (*Wiskie v. Montello Granite Co.*, 885.)

7. MASTER AND SERVANT—INJURY TO SERVANT—PLEADING.—

The rule that requires an employé, in an action against his employer for personal injuries, to negative in his complaint the knowledge of danger involved in the employment, is not affected by a statute making it unnecessary for the plaintiff, in actions for personal injuries, to allege or prove the want of contributory negligence. (*Bowles v. Indiana Ry. Co.*, 279.)

8. MASTER AND SERVANT—SERVANT CANNOT RECOVER

UNLESS WITHOUT FAULT.—A charge that if the master knew of the dangerous condition of a roof, or could have known of it if he or his agents had exercised due care, and if such condition was unknown to an employé injured thereby, and that he had not equal means with his employer of knowing it, then he can recover for such injury, is erroneous, because it omits the limitation that such employé must himself have been without fault. (*Wellston Coal Co. v. Smith*, 547.)

9. MASTER AND SERVANT—NOTICE TO MASTER.—

Notice to the servants and agents who had control of an entry in a mine and cared for and inspected it, is notice to a mining boss and to his principal, irrespective of the grade or rank of such servants or agents. (*Wellston Coal Co. v. Smith*, 547.)

10. **A SERVANT IS CHARGED WITH NOTICE** of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire. (Wellston Coal Co. v. Smith, 547.)

11. **MASTER AND SERVANT—NOTICE TO SERVANT.—A SERVANT IS NOT CHARGEABLE** with notice of the defective or unsafe condition of the place in which he works merely because he had means and opportunity of ascertaining it, because he has the right to rely on his master's performing his duty to furnish a safe place, and is not required to test and inspect such place. (Wellston Coal Co. v. Smith, 547.)

12. **MASTER AND SERVANT—NOTICE, WHAT IMPUTED TO THE MASTER.**—If an assistant of a mining boss, in the performance of his duties in looking for the safety of the roof of an entry, obtains knowledge of its condition, this knowledge, though not reported to such boss, nor to the master, binds the latter. (Wellston Coal Co. v. Smith, 547.)

13. **MASTER AND SERVANT—DELEGATION OF DUTIES.**—A mining boss cannot delegate his duties to a miner in his employ, so as to relieve his employer from responsibility for negligence in the discharge of the duties of a mining boss, whether such negligence arises from the acts or omissions of the mining boss or of some miner under his employ and by him directed to perform the duties of such boss. (Wellston Coal Co. v. Smith, 547.)

14. **MASTER AND SERVANT—SAFE PLACE IN WHICH TO WORK, DELEGATION OF DUTY TO KEEP.**—If a place of entry is furnished to miners by an employing corporation, it is its duty, through its mining boss, to use ordinary care to keep such place in a reasonably safe condition for the miners passing in, through, out, and along the same; and this duty cannot be shifted by such boss to another employé so as to relieve the corporation from liability for his negligence in performing such duties of the mining boss. (Wellston Coal Co. v. Smith, 547.)

15. **MASTER AND SERVANT.—IGNORANCE OF A MASTER OR HIS MINING BOSS** that an entry in a mine was in an unsafe or dangerous condition does not relieve the master from liability to an injured employé, if such condition would have been known if he had used ordinary care and diligence in the performance of his duties. (Wellston Coal Co. v. Smith, 547.)

16. **MASTER AND SERVANT — EVIDENCE OF NEGLIGENCE OF A MINING BOSS—CROSS-EXAMINATION.**—If it appears from the testimony of a witness that he performed certain duties of a mining boss with respect to inspecting and keeping in repair the roof of an entry, and he declares that he had no knowledge of a defect from which an injury to an employé occurs, it is error, on cross-examination, to exclude the question as to whether, if at all, he inspected, by the use of ordinary means for that purpose, the entry at the point where the injury was suffered. (Wellston Coal Co. v. Smith, 547.)

17. **MINING CORPORATIONS.—A MINING BOSS IS NOT A FELLOW-SERVANT WITH THE MINERS EMPLOYED BY HIM;** he stands for and in the place of his master, who is responsible for his acts and omissions. (Wellston Coal Co. v. Smith, 547.)

18. **MINING CORPORATIONS—MINING BOSS.—A MINER PERFORMING THE DUTIES OF A MINING BOSS BY HIS DIRECTION** is not a fellow-servant with other miners, though he is such a fellow-servant when not performing such duties. (Wellston Coal Co. v. Smith, 547.)

19. MASTER AND SERVANT—FELLOW-SERVANTS—TESTS TO DETERMINE WHO ARE.—Whether one servant injured by the negligence of another is a fellow-servant with the latter does not depend upon their respective grade or rank, but upon the nature of the services being performed and in which the negligence occurs. (*Wiskie v. Montello Granite Co.*, 885.)

20. MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE.—A foreman in a blasting quarry and those who assist him are fellow-servants, and the latter cannot recover for injuries received through the negligence of the former. (*Wiskie v. Montello Granite Co.*, 885.)

21. MASTER AND SERVANT—MINOR EMPLOYÉ—NEGLIGENCE—PROXIMATE CAUSE.—If a minor employé in a factory is assigned the duty of sweeping around a dangerous machine containing cog-wheels, without warning or knowledge of the danger therefrom, the act of a fellow-servant in setting the machinery in motion in the course of his duty, while the minor employé is engaged in such sweeping, is not the proximate cause of an injury to the latter, caused by catching her dress in the cog-wheels, especially when it was usual and necessary to have the machinery in motion while the sweeping was being done. (*O'Connor v. Golden Gate Woolen Mfg. Co.*, 127.)

22. MASTER AND SERVANT—MINOR EMPLOYÉ—DUTY TO WARN OF DANGER—NEGLIGENCE.—If a master employs a servant to do work of a dangerous character or in a dangerous place, and the servant, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the danger, it is a breach of duty and negligence on the part of the master to expose such servant, even with his own consent, to such danger, unless he first gives him such instructions or cautions as will enable him to comprehend the risk, and do his work safely with the exercise of proper care on his part. (*O'Connor v. Golden Gate Woolen Mfg. Co.*, 127.)

23. MASTER AND SERVANT—MINOR EMPLOYÉ—CARE REQUIRED OF.—The ordinary care which a minor employé of limited judgment and experience is called upon to exercise in the performance of a certain act within the scope of his duty is not the same quantum of care required of an adult under similar circumstances. Whether such minor employé duly exercised such judgment as he possessed in a given case, taking into consideration his years, experience, and ability, is a question for the jury. (*O'Connor v. Golden Gate Woolen Mfg. Co.*, 127.)

See Contracts; Slander.

MECHANICS' LIENS.

See Fixtures.

MEDICINE.

See Physicians.

MINES AND MINING.

1. MINING CLAIM—SURFACE AND MINERAL RIGHTS—COTENANCY.—If, prior to the location of a quartz claim, the surface is occupied by several parties, who agree that one shall locate

the claim for the benefit of all, and that after the issue of a patent conveyances shall be made to vest in each the full title to the surface occupied by him, and also the undivided interest in the minerals, and the agreement is performed except as to the conveyances of the surface, the occupants do not become tenants in common of the surface, although they do of the claim, save as between themselves. (*Mullins v. Butte Hardware Co.*, 430.)

2. MINING CLAIM.—ABANDONMENT AND FORFEITURE.—AN INSTRUCTION that a location of a placer claim on ground already located is a nullity, unless the jury believe from the evidence that the prior locator had abandoned the claim without any intention to return, is erroneous. It excludes the question of forfeiture. (*McKay v. McDougall*, 395.)

3. MINING CLAIM.—AN ABANDONMENT of a mining claim takes place when the locator voluntarily leaves it to be appropriated by the next comer, without any intention to claim it again, and regardless of what may become of it in the future. (*McKay v. McDougall*, 395.)

4. MINING CLAIMS.—A FORFEITURE of a mining claim takes place by operation of law, without regard to the intention of the locator, whenever he neglects to make the required annual expenditure on the claim within the time allowed. (*McKay v. McDougall*, 395.)

5. MINING CLAIM.—DISCOVERY AND LOCATION.—In the absence of a state statute or a local rule or custom, a compliance with the statutes of the United States as to the discovery and marking the boundaries of a placer claim is sufficient. (*McKay v. McDougall*, 395.)

6. MINING CLAIM.—LOCATION.—IT IS FOR THE JURY to say whether the evidence shows a valid location of a mining claim. (*McKay v. McDougall*, 395.)

7. MINING CLAIM.—THE QUESTION OF FORFEITURE of a mining claim is for the jury, upon the evidence. (*McKay v. McDougall*, 295.)

8. MINING CLAIM.—FORFEITURE.—WORK MAY BE RESUMED on a mining claim after the initiation of a second location, so as to save the forfeiture. (*McKay v. McDougall*, 395.)

9. MINING CLAIM.—THE TERM "LOCATION," in Montana, comprehends all the several steps necessary to make a complete location, and does not mean the initiation of a location by entry and performance of the first necessary step. (*McKay v. McDougall*, 395.)

10. MINING CLAIM.—FORFEITURE.—IT IS ONLY BY A COMPLETE RELOCATION after default of the first locator that a forfeiture of a mining claim is wrought. (*McKay v. McDougall*, 395.)

11. MINING CLAIM.—RELOCATION.—EVIDENCE.—Where the plaintiff located a placer claim on ground already located by a third person, and subsequently the defendant located the same ground, but his notice being defective he filed an amended one, and meanwhile the plaintiff had resumed work, the amended notice is admissible in an action to determine the conflicting rights, upon the theory that if the location of the third person was valid when the plaintiff's was made, the latter was void, in which event the defendant's title would be good. (*McKay v. McDougall*, 395.)

12. MINES.—EXTRALATERAL RIGHTS.—WHERE A VEIN ON ITS COURSE CROSSES TWO OPPOSITE SIDE LINES, the

vein cannot be followed, either on its dip or strike, beyond vertical planes drawn through the side-end lines, and the angle at which it crosses these side lines makes no difference in the application of the principle. (Parrot Silver etc. Co. v. Heinze, 386.)

13. MINES—EXTRALATERAL RIGHTS.—WHERE THE APEX of a vein passes through one of the parallel end lines and a side line, the extralateral rights are bounded by the vertical plane of such end line and a parallel plane passing downward through the point where the apex crosses the side line. (Parrot Silver etc. Co. v. Heinze, 386.)

14. MINING CLAIM—RIGHT TO VEIN UNDER SURFACE.—A patentee of the United States may assert title to the part of a vein beneath the surface of his claim, when the extralateral rights of others do not extend thereto, although the apex lies within another claim. (Parrot Silver etc. Co. v. Heinze, 386.)

15. MINERAL LAND—GRANT OF.—UNDER THE COMMON-LAW RULE, as adopted in this country, a grant of mineral lands without reservation conveys all rights above and beneath the surface, usque ad collum et ad orcum. (Parrot Silver etc. Co. v. Heinze, 386.)

16. MINERAL LAND.—A GRANT FROM THE UNITED STATES under the laws regulating the disposition of mineral lands differs from a common-law grant only in that it may carry extralateral rights, and is subject to the extralateral rights of neighboring locators. (Parrot Silver etc. Co. v. Heinze, 386.)

17. MINING CLAIM—RELATIVE RIGHTS OF CLAIMANTS. Under the United States statutes it is only the locator, his successor, or a patentee who has any right to follow a vein into the boundaries of an adjoining owner, and the latter, holding under a location or patent, is *prima facie* entitled to everything beneath the surface. He can assert this title to prevent intrusion by one who cannot show that he comes with the right acquired by a compliance with the statutes. (Parrot Silver etc. Co. v. Heinze, 386.)

See Deeds, 3; Master and Servant, 15-18.

MISTAKE.

1. MISTAKE—RELIEF IN EQUITY.—When an instrument is drawn and executed that is intended to carry into effect a prior agreement, but by mistake of the draughtsman, either as to law or fact, it does not fulfill the intention of the parties, equity will afford relief. (Dietrich v. Hutchinson, 698.)

2. MISTAKE—DEVESTING TITLE FOR.—Inadvertence and mistake, equally with fraud and wrong, are grounds for judicial interference to divest a title acquired thereby. (Dietrich v. Hutchinson, 698.)

3. MISTAKE—RESCISSION OF CONVEYANCE FOR.—If the parties to a contract for the sale of land undertake to complete it by a deed and a mortgage back, and the mortgage, by mistake or ignorance of the draughtsman, is void, and the party in default, by conveying the property, has placed it out of her power to remedy the defect, this makes a case for rescission, if the other necessary elements exist without countervail. (Dietrich v. Hutchinson, 698.)

MORTGAGE.

1. MORTGAGE. WHAT IS NOT.—A TRUST DEED TO SECURE THE PAYMENT of a loan and to invest the trustee with

a power of sale is not a mortgage. (*Floyd v. National Loan etc. Co.*, 895.)

2. MORTGAGES—PAYMENT OF TAXES BY JUNIOR MORTGAGEE—LIEN.—A junior mortgagee who pays taxes on the mortgaged premises to protect his lien, and without notice of the prior mortgage, is entitled to have the sum thus paid declared a lien superior to such mortgage. (*Fischer v. Woodruff*, 742.)

3. MORTGAGES—RIGHTS OF ASSIGNEE.—If a bona fide purchaser of a note secured by mortgage assigns it after maturity, the assignee is subject to such defenses only as could have been urged against his assignor, unaffected by the fact that his purchase was made after the maturity of the note. (*Fischer v. Woodruff*, 742.)

4. MORTGAGES — ILLEGAL CANCELLATION — ASSIGNMENT—SUBSEQUENT ENCUMBRANCERS — ESTOPPEL.—An assignee of a mortgage, not required by statute to record his assignment, is not estopped by an illegal, though apparently regular, cancellation of the mortgage, from asserting it against a subsequent encumbrancer in good faith and for value, in reliance upon such cancellation and without notice of such assignment, if the assignee had no notice of the cancellation prior to the time of the subsequent encumbrance attached. (*Fischer v. Woodruff*, 742.)

5. MORTGAGES—ILLEGAL CANCELLATION AFTER ASSIGNMENT—SUBSEQUENT ENCUMBRANCERS.—Satisfaction of a mortgage upon the record by a mortgagee, after he has assigned it, does not operate to cancel the mortgage as against a subsequent encumbrancer in good faith and for value, if the assignee is not required to record his assignment. (*Fischer v. Woodruff*, 742.)

6. MORTGAGES—NOTICE OF ELECTION TO ENFORCE SECURITY.—If a mortgage provides that the failure of the mortgagor to comply with any of its conditions shall cause the whole debt to become due, and that the mortgagee may then elect to proceed at once without notice to enforce his security, the commencement of a foreclosure proceeding is notice of such election, and no other notice is necessary. (*National Life Ins. Co. v. Butler*, 462.)

7. MORTGAGES—BREACH OF CONDITION.—PAVING ASSESSMENTS are assessments within the meaning of a clause in a mortgage imposing on the mortgagor the duty of making prompt payment of all "taxes and assessments" lawfully charged against the property, upon the failure of which the entire debt shall become due. (*National Life Ins. Co. v. Butler*, 462.)

8. MORTGAGES—BREACH OF CONDITION—RIGHT TO ENFORCE SECURITY.—If a mortgage provides that upon the failure of the mortgagor to pay delinquent taxes, assessments, and insurance, the mortgagee may make such payments and add them to the original debt, that the mortgage shall stand as security therefor, and that the mortgagee may thereupon declare the whole debt due, and sue to foreclose the mortgage immediately, he may not only make the payments for which the mortgagor is in default, but may also elect to declare the whole debt due, and proceed to foreclose the mortgage. (*National Life Ins. Co. v. Butler*, 462.)

9. MORTGAGES—COUNSEL FEE FOR FORECLOSURE.—If a mortgage creates an obligation on the part of the mortgagor to pay a reasonable counsel fee for its foreclosure, but does not provide that such fee shall be secured by the mortgage, it is error to provide in the judgment foreclosing it that such counsel fee shall be a lien upon the mortgaged lands, and to direct its payment out of the proceeds of their sale. (*Loewenthal v. Coonan*, 115.)

10. MORTGAGES — FORECLOSURE — PLAINTIFF PURCHASER—DEFICIENCY JUDGMENT.—A plaintiff purchaser in foreclosure proceeding may afterward sell the property for a sum equal to the amount of the decree and costs, without affecting his rights as to a deficiency judgment obtained in the foreclosure proceeding. (*Stover v. Stark*, 460.)

11. MORTGAGES — FORECLOSURE — DEFICIENCY JUDGMENT—APPEAL.—No decree or judgment for a deficiency can be rendered until after the report of the sale of the mortgaged premises and the application of the proceeds to the satisfaction of the mortgage debt. The rendition of the deficiency judgment is a judicial function, and until it is exercised no appeal lies therefrom. (*Parmelee v. Schroeder*, 466.)

12. MORTGAGES — FORECLOSURE — DEFICIENCY JUDGMENT.—A final judgment for a deficiency in foreclosure proceedings cannot be rendered until after the incoming of the report of the sale of the mortgaged premises. If, though in form a deficiency judgment, it is in fact rendered before that time, it is a mere nullity, which does not conclude the rights of the parties thereto, and upon which execution may not issue. (*Parmelee v. Schroeder*, 466.)

13. MORTGAGES—DEFICIENCY JUDGMENT—RIGHT OF APPEAL.—A decree in foreclosure that if, on the incoming of the report of the sale of the mortgaged premises, the money arising therefrom is insufficient to satisfy the amount found due, the deficiency shall be specified, and upon application the mortgagee is entitled to a judgment for the deficiency and to execution therefor, is not a final judgment from which an appeal will lie. (*Parmelee v. Schroeder*, 466.)

See Acknowledgments; Deeds; Fixtures, 6, 7; Homesteads; Husband and Wife; Infants.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—ORDINANCES—LICENSE—TAXATION.—A municipal ordinance requiring any person selling goods, wares, or merchandise to procure a license therefor, unless he is a merchant paying an annual tax therefor, or a traveling agent, selling exclusively by sample, or otherwise, to regular merchants, is not void as being in conflict with a constitutional provision that all taxation shall be equal and uniform. (*State v. Willingham*, 948.)

2. MUNICIPAL CORPORATIONS — ORDINANCES — PRESUMPTION.—A municipal ordinance is presumed to be reasonable. (*Ex parte Wygant*, 673.)

3. MUNICIPAL CORPORATIONS—ORDINANCE PROHIBITING BURIALS.—Under charter power to provide for the health, cleanliness, and good order of the city, an ordinance prohibiting the interment of dead bodies within the city limits, if unreasonable as applied to sparsely inhabited sections thereof, and general in its scope and operation, is wholly void. (*Ex parte Wygant*, 673.)

4. STREETS REPRESENTED ON MAPS AND PLATS, WHO MAY INSIST UPON THE OPENING OF.—Where streets are marked on a plat, all who buy with reference to the general plat or scheme disclosed thereby acquire a right to all the public ways represented thereon, and may force a dedication. Their right is not limited to having abutting streets opened to the first cross-streets. (*Cook v. Totten*, 792.)

5. STREETS REPRESENTED ON PLATS, ACCEPTANCE OF DEDICATION OF NOT NECESSARY.—Where a land owner lays out his lands into lots, streets, and alleys, and has it platted and makes sales by such plats, he thereby dedicates such streets and alleys to the use of lot owners and the public, and the rights of a lot owner are not to wait in abeyance until the public authorities see fit to accept and take charge of such streets and alleys. Where the public right to use and control depends upon the acceptance or dedication, a private right of purchasers is acquired at the time of the purchase, and may precede the public's right. (*Cook v. Totten*, 792.)

6. STREETS.—EQUITY MAY COMPEL A LAND OWNER TO OPEN STREETS represented as such on a plat by which he has sold lots, though the public authorities have not accepted the dedication. (*Cook v. Totten*, 792.)

7. PUBLIC STREETS, CLOSING OF.—An abutting lot owner has such an interest in a part of the street on which he abuts that the closing of it up, or the impairment of its use as a means of access, or the addition of a new burden, is a taking of private property for a public use, and cannot be done without compensation. (*Kinnear Mfg. Co. v. Beatty*, 600.)

8. PUBLIC STREET, CLOSING OF, WHO MAY COMPLAIN OF.—One who is not an abutter upon the vacated part of a public street, and who has ample means of access to his property by other streets and public ways, is not entitled to an injunction against such vacation or against the erection of a building upon the part of the street vacated. (*Kinnear Mfg. Co. v. Beatty*, 600.)

9. PUBLIC STREETS, VACATION OF.—The fact that streets and alleys are represented as such on the plat of an addition to a city, and lots are sold by such plat, does not entitle a lot owner to enjoin the vacation of a part of the street on which his lot does not abut. (*Kinnear Mfg. Co. v. Beatty*, 600.)

10. MUNICIPAL CORPORATIONS—SUITS AGAINST—TORTS. A statute requiring "claims" against cities to be presented to the city council before suit can be brought thereon applies to charges arising in tort. (*Barrett v. City of Mobile*, 54.)

11. MUNICIPAL CORPORATIONS — SUITS AGAINST — PLEADING.—Where "claims" against a city must be presented to the city council before suit is brought, a complaint in an action in tort against a city must aver that such presentation has been made. (*Barrett v. City of Mobile*, 54.)

See Cemeteries; Evidence, 1; Interstate Commerce.

MURDER.

See Homicide.

NEGLIGENCE.

NEGLIGENCE, CONTRIBUTORY, SLIGHTEST DEGREE OF.—In an action by a miner to recover for injuries suffered from the fall of slate from the roof of an entry, it is error to instruct the jury that if he had used a greater quantity of powder than a reasonably prudent miner would use under the circumstances, and thereby in the slightest degree contributed to such fall, he cannot recover. (*Wellston Coal Co. v. Smith*, 547.)

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS.—A PURCHASER OF A NEGOTIABLE INSTRUMENT FROM A BONA FIDE HOLDER** may generally recover, notwithstanding the knowledge by such purchaser of facts which, if known to the innocent holder, would have defeated his recovery. (*Andrews v. Robertson*, 870.)

2. **NEGOTIABLE INSTRUMENTS—PURCHASE OF BY THE ORIGINAL PAYEE FROM A BONA FIDE HOLDER.**—If the original payee of a negotiable instrument transfers it to a bona fide holder, by whom it might be asserted notwithstanding the defenses of which the original payee had knowledge, the latter, on repurchasing it, does not succeed to the rights of the innocent holder, but is subject to all defenses which might have been asserted against him if he had never made any transfer. (*Andrews v. Robertson*, 870.)

3. **PROMISSORY NOTES, CONSTRUCTIVE DELIVERY OF TO CHILDREN.**—If a father intends to execute notes in favor of his minor children for a sum due from him to their deceased mother, and in fact signs such notes, exhibits them to sundry relatives of his and hers, and expresses himself as bound by them, this must be regarded as a sufficient constructive delivery to the payees. (*Rowan v. Chenoweth*, 796.)

NEW TRIAL.

1. **NEW TRIAL.**—**MOTION** for new trial is unnecessary if the error complained of is that the pleadings, taken together, do not support the judgment. (*Ames v. Parrott*, 536.)

2. **NEW TRIAL.**—**TIME WITHIN WHICH MOTION** for a jury trial must be filed is to be calculated from the date of rendition of the judgment, and not from the date of entry thereof. (*Ames v. Parrott*, 536.)

NONSUIT.

See Appeal and Error, 3.

NOTICE.

NOTICE.—POSSESSION OF A DEFINITE TRACT by one rightfully in possession or holding under a valid title is a constructive notice to subsequent purchasers and encumbrancers of whatever estate or interest in the land is held by the occupant, equivalent in its extent and effects to the notice given by the recording of his title. (*Mullins v. Butte Hardware Co.*, 430.)

NUISANCE.

See Cemeteries; Limitation of Actions, 2.

OFFICE AND OFFICERS.

1. **PUBLIC OFFICE.**—**A PARTNERSHIP IN A PUBLIC OFFICE** cannot exist, because it is against public policy, but there may be a deputyship with the services of a deputy to be compensated by a share of the emoluments of the office. (*Rowan v. Chenoweth*, 796.)

2. OFFICERS—COLLATERAL ATTACK ON TITLE.—The right of an assessor to his office cannot be collaterally attacked in an action to enjoin the collection of taxes levied by him. (*Northwestern Lumber Co. v. Chehalis County*, 747.)

3. OFFICERS.—BAILIFFS OF A MUNICIPAL COURT ARE NOT MEMBERS OF THE POLICE DEPARTMENT, for they are appointed for a special service, without reference to their qualifications for service as members of such department. (*Parish v. City of St. Paul*, 374.)

4. OFFICERS—APPOINTMENT OF COURT BAILIFFS—POWER OF POLICE DEPARTMENT.—WHERE A COURT ACT provides that court bailiffs shall be appointed by the mayor with the concurrence of the judges, the city police department, which under the city charter has the powers and duties of the mayor under such act, cannot remove or appoint court bailiffs without the concurrence of the judges. (*Parish v. City of St. Paul*, 374.)

5. OFFICERS—REMOVAL.—WHERE NO TENURE OF OFFICE IS FIXED BY LAW, and no provision is made for the removal of the incumbent, the power of removal is a necessary incident to the power of appointment. (*Parish v. City of St. Paul*, 374.)

6. OFFICERS—HOW REMOVED.—AN INCUMBENT OF THE OFFICE OF BAILIFF in a municipal court can only be removed by the appointment of his successor in the same way that the incumbent was originally appointed. (*Parish v. City of St. Paul*, 374.)

ORDINANCE.

See Evidence, 1; Municipal Corporations.

OSTEOPATHY.

See Constitutional Law, 19; Physicians.

PARTITION.

See Advancements.

PASSENGERS.

See Master and Servant, 1, 2.

PENALTY.

PENALTIES.—THE IMPOSITION OF A PENALTY, IN A STATUTE, for the doing of an act, is equivalent to a positive prohibition of the act. (*Isenhour v. State*, 223.)

PERJURY.

See Judgments, 34, 36; Trial, 2.

PERMANENT EMPLOYMENT.

See Contracts.

PHYSICIANS.

PRACTICE OF MEDICINE—OSTEOPATHY, STATUTES WHICH APPLY TO.—A statute directed against any person who practices, or recommends for a fee, the use of any drug, medicine, appliance, application, operation, or treatment, of whatever nature, for the cure or relief of any wound, fracture, or bodily injury, infirmity, or disease, applies to persons practicing osteopathy. (*State v. Gravett*, 605.)

PLEADING.

1. PLEADING.—IF THE COMPLAINT IN AN ACTION ON A NOTE averred that the note was past due and unpaid, that payment had been demanded, and that the plaintiff was the holder thereof, a judgment thereon is admissible in a collateral action, conceding that nonpayment of the note was defectively alleged. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

2. PLEADING.—A REPLY DENYING "EACH AND EVERY MATERIAL ALLEGATION" of the answer is bad. But objection thereto, if not taken in the court below, is waived on appeal. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

3. PLEADING—PROOF TO MITIGATE DAMAGES.—UNDER THE GENERAL ISSUE, the fact that the defendant acted under a supposed, though invalid, authority may be proven for the limited purpose of mitigating or preventing exemplary damages. (*Barrett v. City of Mobile*, 54.)

See Actions.

POSSESSION.

See Notice.

PRESCRIPTION.

PRESCRIPTION—ABUTTING OWNERS.—WHERE A HIGHWAY OR PUBLIC PARK has been laid out by lawful authority or acquired by dedication or prescription, the owners of property abutting thereon acquire a special right in the continuance of the park or highway, of which they cannot be deprived except by due process of law. (*Kray v. Muggli*, 332.)

See Adverse Possession; Easements, 6; Limitation of Actions; Waters and Watercourses, 32, 34.

PRINCIPAL AND AGENT.

See Agency.

PRINCIPAL AND SURETY.

See Suretyship.

PROBATE PROCEEDINGS.

See Executors and Administrators; Judgments.

PROCESS.

1. SERVICE OF SUMMONS ON SUNDAY IS VOIDABLE.—It may be quashed or set aside on motion, but, like any other irregularity, may be waived. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

2. SERVICE OF SUMMONS ON SUNDAY IS NOT A NULLITY but a mere irregularity, and a judgment based upon it is not void. (*Burke v. Interstate Sav. etc. Assn.*, 416.)

3. ACTIONS AGAINST MINORS—SUFFICIENCY OF SUMMONS.—If the statute provides that in an action against a minor summons shall be served by delivering a copy to such minor personally, and also to his father, mother, or guardian, service of summons upon the mother of the minor defendant, directed to her as such mother only, and directing her to appear and defend the action, together with personal service upon the minor, is a sufficient compliance with the statute. (*Kalb v. German Sav. etc. Soc.*, 757.)

See Corporations, 28; Judgments, 13-31; Justice's Court; Unknown Owners.

PUBLIC LANDS.

1. PUBLIC LANDS—CANCELLATION OF ENTRY—NOTICE. If, upon an ex parte proceeding for the cancellation of an entry of public lands, the officers of the national government have notice that the original entryman has transferred his rights to another, failure to give the transferee notice of the proceedings invalidates the cancellation. (*Whitney v. Spratt*, 738.)

2. PUBLIC LANDS.—TIMBER LANDS unfit for cultivation are within the provisions of the timber purchase act of Congress, although they may become fit for cultivation by the removal of the timber. (*Whitney v. Spratt*, 738.)

3. PUBLIC LANDS—PATENT—COLLATERAL ATTACK.—A desert land patent cannot be collaterally attacked for mere irregularity in its issuance by one who has no superior equities to the holder of the legal title, or has not connected himself with the paramount source of title, and who claims to hold adversely to the legal title. (*Phillips v. Carter*, 152.)

4. PUBLIC LANDS—ASSIGNMENT OF RIGHT OF ENTRY.—A right of entry to desert land in favor of one who has reclaimed such land is assignable, and passes upon the death of the entryman to his widow under a residuary devise to her, and by her may then be assigned to one who may then obtain patent under such entry. (*Phillips v. Carter*, 152.)

See Homesteads, 9.

PUBLIC OFFICE.

See Office and Officers.

QUIETING TITLE.

See Ejectment.

QUO WARRANTO.

See Corporations, 32-33.

RAILROADS.

1. RAILROADS—FENCES.—A RIGHT TO RECOVER FOR INJURIES TO A CHILD OF TENDER YEARS accrues where such injuries are caused by the failure of a railroad company to fence its

tracks as required by statute. (*Marengo v. Great Northern Ry. Co.*, 369.)

2. **THE OBLIGATION OF A RAILROAD COMPANY TO FENCE ITS TRACKS AS REQUIRED BY STATUTE IS ABSOLUTE**, save where there is some exception by implication based upon public policy, necessity, or convenience. (*Marengo v. Great Northern Ry. Co.*, 369.)

3. **RAILROADS—FENCES—DEFENSE.**—A railroad company cannot relieve itself from negligence in failing to fence its tracks by showing that another railroad, similarly situated, has also been guilty of the same fault. (*Marengo v. Great Northern Ry. Co.*, 369.)

4. **PUBLIC STREETS FURNISH AN EXCEPTION TO THE DUTY OF A RAILROAD COMPANY TO FENCE** its tracks as required by statute. (*Marengo v. Great Northern Ry. Co.*, 369.)

5. **RAILROADS—FENCES ACROSS STREETS.**—Under a statute requiring a railroad company to fence its tracks, it cannot be required or even permitted to build fences across legally laid-out highways, even if such highways are unopened and untraveled. (*Marengo v. Great Northern Ry. Co.*, 369.)

6. **RAILWAY TICKET—TIME LIMIT.**—If the holder of a round-trip ticket starts on his return within the time therein limited, but stops at an intermediate station to change cars to another division of the railroad, and while he there waits for the train his ticket expires, he is entitled to continue his journey, and may hold the railway company liable for denying him admission to its train. (*Cleveland etc. Ry. Co. v. Kinsley*, 245.)

7. **A RAILWAY TICKET MUST BE GIVEN A CONSTRUCTION** most favorable to the passenger. Courts look with disfavor on a construction which will work a forfeiture of the transportation purchased. (*Cleveland etc. Ry. Co. v. Kinsley*, 245.)

8. **RAILWAYS—EXCLUSION FROM TRAIN.—THE HUMILIATION** suffered by a passenger in being wrongfully denied admission to a train is an element of the damages sustained. (*Cleveland etc. Ry. Co. v. Kinsley*, 245.)

9. **RAILWAYS—EXCLUSION FROM TRAIN—DAMAGES.**—If, in an action for wrongfully denying a passenger admission to a train, the amount of compensatory damages recovered cannot be said to be excessive through improper motives of the trier, it will be allowed to stand. (*Cleveland etc. Ry. Co. v. Kinsley*, 245.)

10. **RAILROAD—SLEEPING-CAR COMPANY AND EMPLOYEE.** A railroad company is under no legal duty to receive a sleeping-car from a Pullman company, nor its employé thereon. (*Russell v. Pittsburgh etc. Ry. Co.*, 214.)

11. **RAILROAD—RELEASE FROM LIABILITY TO PALACE-CAR EMPLOYEE.**—A railroad corporation may contract for a release from liability for negligence toward an employé of a sleeping-car company, whose coaches are attached to the former company's passenger train. (*Russell v. Pittsburgh etc. Ry. Co.*, 214.)

12. **RAILROAD—RELEASE FROM LIABILITY.—A CONTRACT BETWEEN A SLEEPING-CAR COMPANY** and its employé, releasing transportation companies over whose lines its coaches may operate from all liability for personal injuries to him, is valid, and inures to the benefit of a railroad company hauling a coach in which the employé is injured. (*Russell v. Pittsburgh etc. Ry. Co.*, 214.)

13. RAILROAD—RELEASE FROM LIABILITY FOR NEGLIGENCE.—A contract between a sleeping-car company and its employé releasing transportation companies "from all claims for liability of any nature or character whatsoever, on account of any personal injury or death." includes injuries resulting from the negligence of a transportation company. (*Russell v. Pittsburgh etc. Ry. Co.*, 214.)

14. A CONTRACT EXEMPTING A RAILROAD COMPANY FROM ITS STATUTORY LIABILITY for negligence, made between it and the next of kin of its employé, is against public policy and invalid. (*Tarbell v. Rutland R. R. Co.*, 734.)

See Adverse Possession; Carriers; Master and Servant.

RAPE.

1. RAPE—INDICTMENT—AGE OF ACCUSED.—It is not necessary to allege the age of the accused in an indictment for rape, under a statute providing that if any person over a stated age shall carnally know any female child under a stated age he shall be guilty of rape. If the accused was below the required age, it is mere matter of defense. (*State v. Knighten*, 647.)

2. RAPE—CORROBORATING EVIDENCE.—A conviction for rape may be sustained on the uncorroborated testimony of the prosecutrix. (*State v. Knighten*, 647.)

RECEIVERS.

1. RECEIVERS—RATIFICATION OF INVALID CONTRACT. The acceptance by a receiver of rents reserved under an invalid lease does not amount to a ratification thereof, if he has no knowledge of the material facts and circumstances. (*Groveland Imp. Co. v. Farmers' Supply Co.*, 755.)

2. RECEIVER PENDENTE LITE.—A PROCEEDING FOR THE APPOINTMENT of a receiver pendente lite is but ancillary or auxiliary to the main action, and is not its ultimate object. (*Sheridan Brick Works v. Marion Trust Co.*, 207.)

3. RECEIVER OF CORPORATION.—THE RULE REQUIRING STOCKHOLDERS TO SEEK REDRESS from the officers of the corporation before applying to a court of equity for relief does not apply where there is no directory or governing body to which an application can be made. (*Sheridan Brick Works v. Marion Trust Co.*, 207.)

4. RECEIVER OF CORPORATION—GROUNDS FOR.—In an action on certain notes against a corporation by the administrator of a deceased stockholder and creditor thereof, a receiver pendente lite should be appointed for the corporation, where it appears that there virtually is no governing body, that there are dissensions among the stockholders, that the concern has no available means to operate its plant or pay its indebtedness, and that its property is deteriorating in value. (*Sheridan Brick Works v. Marion Trust Co.*, 207.)

See Appeal and Error, 4

RECORDS.

1. TITLE—RECORD AS NOTICE—COTENANTS OF MINING CLAIM.—If, according to their title as shown by record, certain persons are tenants in common of a mining claim, the occupancy

by each of a separate portion of the surface, with the payment of taxes and the making of improvements, imparts no notice to subsequent purchasers or encumbrancers that he claims a surface interest in severalty. (*Mullins v. Butte Hardware Co.*, 430.)

2. TITLE-RECORD AS NOTICE—COTENANCY.—The actual occupancy of one tenant in common is the rightful possession of all, and if a title under which they might hold is of record and is consistent with the occupancy, the possession must be referred to the record, and will not be constructive notice of any other title. (*Mullins v. Butte Hardware Co.*, 430.)

3. TITLE—RECORD AS NOTICE OF.—If the title under which an occupant holds has been put on record, and his possession is consistent with what thus appears of record, it is not constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, and has had no actual notice beyond what is thereby disclosed. (*Mullins v. Butte Hardware Co.*, 430.)

RENT.

See Landlord and Tenant.

RES JUDICATA.

See Judgments, 11.

RIPARIAN RIGHTS.

See Waters and Watercourses.

ROBBERY.

ROBBERY—THREATS OF INJURY TO REPUTATION.—Evidence that money or goods were obtained from a man by putting him in fear of an injury to his property or reputation, as by threatening to accuse him of an unnatural crime, is sufficient to establish the crime of robbery. (*Thompson v. State*, 453.)

SALES.

SALE—FRAUD OF BUYER.—A VENDOR OF GOODS CANNOT maintain replevin for their recovery, on the ground that the sale was induced by fraud, without returning or tendering the amount received on account of the sale. (*Adam, Meldrum etc. Co. v. Stewart*, 240.)

SEIZURES AND SEARCHES.

See Constitutional Law, 15, 16; Evidence, 7.

SELF-DEFENSE.

See Homicide.

SENTENCES.

See Criminal Law, 5, 11; Habeas Corpus, 3.
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SLANDER.

SLANDER.—SILENCE CANNOT AMOUNT TO SLANDER.

Hence an employer cannot be held liable for refusing to give a clearance card, though such refusal may, and probably will, prevent his obtaining employment. (New York etc. R. R. Co. v. Schaffer, 628.)

SLEEPING-CAR COMPANIES.

See Railroads, 10-13.

STARE DECISIS.

See Appeal and Error, 2.

STATUTES.

1. STATUTES, PENAL, CONSTRUCTION OF.—Strict construction also permits sensible construction having in view the purpose of the law to be construed, and when that purpose is manifest, strict construction does not militate against any departure from the primary meaning of words within the reasonable scope thereof. (Nelson v. State, 881.)

2. STATUTES ADOPTED FROM ANOTHER STATE—BINDING EFFECT OF CONSTRUCTION OF—JUDGMENT LIENS.—Although a statute of one state is adopted in another state, the courts of the latter state are not bound by the construction placed upon the statute in the former state, if such statute is not peculiar to that state alone and other states have adopted it, and their courts have placed a different construction upon it. The rule is here applied as to the effect of a judgment as a lien on after-acquired lands. (Coad v. Cowhick, 953.)

3. STATUTES, PENAL.—EFFECT OF THE REPEAL of a penal statute is to prevent any prosecution, trial, or judgment for any offense committed against it while it was in force, unless there is a saving clause in the repealing act. If it is repealed pending an appeal, and before the final action of the appellate court, the repeal will prevent the affirmance of a conviction. The prosecution must be dismissed, or the judgment reversed. (Ball v. Tolman, 110.)

4. JUDGMENTS.—EFFECT OF REPEAL OF PENAL STATUTE before final judgment in an action to enforce a penalty thereunder, and pending a motion for a new trial, is to avoid the judgment and all proceedings thereunder, and the action should then be dismissed. (Ball v. Tolman, 110.)

5. JUDGMENTS—EFFECT OF REPEAL OF PENAL STATUTE.—If a penal statute on which an action is based is repealed before final judgment in the lower court, it has no jurisdiction to proceed further in the case. (Ball v. Tolman, 110.)

See Constitutional Law.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STREETS.

See Municipal Corporations.

SUMMONS.

See Process.

SUNDAY.

See Process, 1, 2.

SURETYSHIP.

1. **SURETYSHIP—STATUTE OF LIMITATIONS.**—A SURETY'S RIGHT OF ACTION for reimbursement accrues from the time he pays the notes of his principal, and not from their date, and the statute of limitations does not begin to run against such surety until the date of such payments. (*Loewenthal v. Coonan*, 115.)

2. **SURETYSHIP.**—A MARRIED WOMAN is not liable, in Indiana, on her contract of suretyship. (*Rogers v. Shewmaker*, 274.)

TAXATION.

1. **TAXATION.**—OCEAN-GOING TUGS registered in another state and owned by a foreign corporation are taxable in the state where they have their situs, and when they are engaged in plying wholly within the waters of the state. (*Northwestern Lumber Co. v. Chehalis County*, 747.)

2. **TAXATION OF MIGRATORY LIVESTOCK.**—Whether the purpose of an owner of livestock in bringing it into, and driving it through, the state is that it may graze there, and while in transit receive the benefits from grazing, the same as if kept in the state from which it came, and thus attain a situs in the state of transit for the purpose of taxation, or whether the purpose is merely to drive the stock through the state in transit to a market, depends upon the course taken, the method of travel, the time consumed, and the width of territory covered. (*Kelley v. Rhoads*, 959.)

3. **TAXATION OF MIGRATORY LIVESTOCK.**—If the principal purpose of an owner of livestock in bringing it into, and driving it through, the state to another market is to graze it, and it is maintained by grazing while it is being driven through the state, it is subject to state taxation without any interference with interstate commerce. (*Kelley v. Rhoads*, 959.)

4. **TAXATION OF MIGRATORY LIVESTOCK.**—If livestock is brought into the state for the purpose of driving it through the state to another market, and it is held and allowed to graze for any other purpose than of terminating the transit within a reasonable time, it becomes liable to state taxation. (*Kelley v. Rhoads*, 959.)

5. **TAXES—WHEN DELINQUENT.**—Payment of taxes before they become delinquent is not made by paying them on the day they become delinquent. (*National Life Ins. Co. v. Butler*, 462.)

6. **EVIDENCE—TAX RECEIPTS.**—An admission, when tax receipts are offered in evidence, that the taxes described in such receipts were duly levied and assessed, is an admission that the assessments were made at the date mentioned in the receipts. (*National Life Ins. Co. v. Butler*, 462.)

7. **EVIDENCE.—TAX RECEIPTS** for the payment of a special assessment are, per se, competent evidence of the date of such assessment as stated in such receipts. (*National Life Ins. Co. v. Butler*, 462.)

See Interstate Commerce; Municipal Corporations, 1.

TICKETS.

See Railroads, 6, 7.

TIMBER LANDS.

See Public Lands.

TITLE.

See Records.

TITLE OF STATUTE.

See Constitutional Law, 14.

TRAVELERS.

See Concealed Weapons.

TRESPASS.

IN TRESPASS DE BONIS ASPORTATIS, A DEFENSE based on legal authority for the taking complained of is in justification of the act, and in order to be proved must be pleaded specially. (*Barrett v. City of Mobile*, 54.)

TRIAL.

1. **TRIAL—DIRECTING VERDICT.**—A verdict for plaintiff may be directed if a verdict for defendant cannot, for want of sufficient evidence, be permitted to stand. (*Burke v. First National Bank*, 447.)

2. **TRIAL—ASSUMPTION AS TO ADVERSARY—PERJURY.**—Each of the parties to a suit should anticipate that his adversary will offer evidence to support his allegations, and must be prepared to meet such evidence with counter proof. If he has an opportunity to do this and does not avail himself of it, he cannot obtain a retrial before another tribunal by charging that the judgment against him was procured by perjury. (*Secord v. Powers*, 474.)

See Instructions.

TROVER AND CONVERSION.

1. **IN AN ACTION OF TROVER FOR THE KILLING OF AN ANIMAL BY A HEALTH OFFICER**, it is competent to show in defense that the animal was killed in pursuance of a reasonable police regulation in promotion of the public health. (*Barrett v. City of Mobile*, 54.)

2. **PLEADING.—IN TROVER A VALID AUTHORITY FOR APPROPRIATION OR DESTRUCTION OF PROPERTY** involved may be proven under the general issue and in bar of the action. (*Barrett v. City of Mobile*, 54.)

See Corporations, 21; Cotenancy.

TRUST DEEDS.

See Husband and Wife; Mortgages.

TRUSTS AND TRUSTEES.

1. A TRUST IS NOT CREATED BETWEEN AN OFFICER AND HIS DEPUTY with respect to moneys received by the latter for the former. (*Rowan v. Chenoweth*, 796.)

2. WHEN A TRUST IS IMPOSED BY LAW, THE STATUTE OF LIMITATIONS BEGINS TO RUN in favor of the holder of the legal title against the equitable owner at the time of the conveyance, if there is no recognition of the beneficiary's rights, but if his rights are recognized, then at the time when the holder of the legal title begins to hold adversely. (*Haney v. Legg*, 81.)

3. TRUST—PAROL EVIDENCE.—A TRUST WHICH ARISES BY OPERATION OF LAW is not within the statute of frauds, and may be established by parol. (*Haney v. Legg*, 81.)

4. A RESULTING TRUST IN FAVOR OF ONE WHO FURNISHES MONEY FOR THE PURCHASE OF LAND, the title to which is taken in the name of another, does not arise, unless the payment is made before or at the time of the purchase. (*Haney v. Legg*, 81.)

5. RESULTING TRUST.—WHERE A HUSBAND PURCHASES LAND with money which is his wife's separate property, taking title in his own name, a trust arises by operation of law, in favor of the wife, which may be established by parol. (*Haney v. Legg*, 81.)

6. RESULTING TRUST.—WHERE A TRUSTEE EMPLOYS THE MONEY OF HIS BENEFICIARY in the purchase of lands, taking title in his own name, the trust which arises originates in the right to pursue the trust fund, and it is immaterial whether the money of the beneficiary is used before or at the time of the purchase, or subsequently thereto. (*Haney v. Legg*, 81.)

7. RESULTING TRUST.—IF ANY PORTION OF THE PURCHASE MONEY used in buying land has been paid out of a trust fund, a resulting trust arises in favor of the beneficiary to the extent of the sum so used. (*Haney v. Legg*, 81.)

8. TRUSTEE'S SALE—TRUSTEE'S FEE.—An agreement in a trust deed to secure the payment of a loan that a commission be paid to the trustee for making a sale cannot affect the validity of the loan nor invalidate the notice of the sale. (*Floyd v. National Loan etc. Co.*, 805.)

UNKNOWN OWNERS.

1. UNKNOWN OWNERS—PUBLISHING SUMMONS.—In an action under the Minnesota statutes allowing suits to be brought to determine the adverse claims of unknown owners to land, service of summons may be made by publication without an order of court. (*McClymond v. Noble*, 354.)

2. JURISDICTION OF UNKNOWN OWNERS.—IN AN ACTION TO DETERMINE THE ADVERSE CLAIMS of unknown owners to land, the fact that the named defendant in the summons was dead when the action was commenced will not prevent the court from acquiring jurisdiction to determine the rights of unknown claimants. (*McClymond v. Noble*, 354.)

3. WHERE AN UNKNOWN OWNER IS A RESIDENT OF THE STATE when an action is begun to determine adverse claims to land, the fact that the summons was served by publication only will not affect the jurisdiction of the court. (*McClymond v. Noble*, 354.)

4. CONSTITUTIONAL LAW—PROCEEDINGS IN REM.—A STATUTE AUTHORIZING AN ACTION TO DETERMINE ADVERSE CLAIMS OF UNKNOWN OWNERS is in the nature of a proceeding in rem, and is therefore not unconstitutional by reason of the fact that the summons is allowed to be served by publication. (*McClymond v. Noble*, 354.)

VENDOR AND VENDEE.

VENDOR AND VENDEE—BONA FIDE PURCHASER.—If one who has notice of an outstanding equity conveys, either mediately or immediately, to one without notice and for a valuable consideration, such purchaser is entitled to protection. (*Mullins v. Butte Hardware Co.*, 430.)

WATERS AND WATERCOURSES.

1. WATERS—WRONGFUL DIVERSION.—A COMPLAINT for damages and an injunction averring that upon the defendant's land two ravines unite, from the banks of which and into which water flows from springs throughout the year, having its outlet in a pond on the defendant's land, and flowing upon the plaintiff's only in time of overflow, but that the defendant has constructed a dam, causing the water to flow on the plaintiff's land, rendering it unfit for cultivation, and is threatening to continue the same, states a cause of action. (*Maxwell v. Shirts*, 268.)

2. A WATERCOURSE IS A STREAM OF WATER ordinarily flowing in a certain direction, through a defined channel, with bed and banks. The size of the stream is not material. (*Maxwell v. Shirts*, 268.)

3. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—A riparian proprietor has a right to the use of the water naturally flowing past or through his land, subject to the right of lower riparian owners to a reasonable use thereof for domestic, agricultural, and manufacturing purposes. (*Jones v. Conn*, 634.)

4. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—Every riparian owner has a right to the ordinary use of water naturally flowing past his land for domestic purposes without regard to the effect of such use upon the lower proprietors. He also has the right to use it for any purpose whatever, provided he does not thereby interfere with the rights of other proprietors, either above or below him. (*Jones v. Conn*, 634.)

5. WATERS AND WATERCOURSES—USE FOR IRRIGATION.—After the natural wants of all riparian proprietors are supplied, each proprietor is entitled to a reasonable use of the water for irrigating purposes. (*Jones v. Conn*, 634.)

6. WATERS AND WATERCOURSES—RIPARIAN LANDS—WHAT ARE.—Lands bordering on a stream are riparian, if under one ownership, without regard to their extent or area, or the source or time of the acquirement of their title. (*Jones v. Conn*, 634.)

7. WATERS AND WATERCOURSES—RIPARIAN OWNERS—WHO ARE.—Any person owning land which abuts upon, or through which a natural stream of water flows, is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired his title. (*Jones v. Conn*, 634.)

8. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—

Under a claim of riparian rights alone, the owner of land cannot, to the injury of another riparian owner, take the water beyond the watershed, or onto lands held by a title different from the title of those through which the stream flows. (Jones v. Conn, 634.)

9. WATERS AND WATERCOURSES.—A right to make a reasonable use of the water of the stream depends on the ownership of the land abutting on or through which the stream flows, and whether a given use is reasonable or not, is a question of fact, to be determined under the circumstances of each particular case. The right to use the water belongs to the owner of the land, and the extent of its exercise is not to be determined by the area or contour of his land, but by its effect upon other riparian proprietors. (Jones v. Conn, 634.)

10. WATERS AND WATERCOURSES.—The rule that the riparian proprietor is entitled to have the entire flow of the stream come down to his premises is subject to the limitation that an upper riparian proprietor may make such a use thereof as does not work any actual, material, and substantial damage to the common right of each proprietor. Whether the proposed use is reasonable does not depend so much upon the area of the land of the offending owner, or the place of the use, as upon the effect it has upon the correlative rights of the other proprietors. (Jones v. Conn 634.)

11. WATERS AND WATERCOURSES—RIGHT OF IRRIGATION.—A riparian owner who uses the water of the stream for the purpose of irrigation is not a wrongdoer, although his land lies above the level of the stream, so that it cannot be irrigated by means of ditches wholly upon his own land, if by such use he does not materially injure or interfere in any substantial way with the rights of other riparian proprietors. (Jones v. Conn, 634.)

12. WATERS AND WATERCOURSES—IRRIGATION—INJUNCTION.—A court of equity cannot restrain the use of water by a riparian proprietor to irrigate his lands, unless it is shown that such use will injure other riparian proprietors; but if such owner sets up an absolute right to sufficient water to irrigate his land, regardless of the effect it may have upon other proprietors, such a decree may be rendered as will prevent such attempted use from ripening into an adverse title. (Jones v. Conn, 634.)

13. WATERS AND WATERCOURSES—RIPARIAN RIGHTS.—WATERSHED.—The right of the riparian owner to the use of the water of the stream for irrigation purposes is not limited to the watershed from which the water is taken, nor to bordering lands first segregated by the government. (Jones v. Conn, 634.)

14. WATERS AND WATERCOURSES—RIGHT TO APPROPRIATE WATERS OF SPRINGS.—The waters of a perennial spring are subject to appropriation in the same manner as the waters of running streams. (Brosnan v. Harris, 649.)

15. CONSTITUTIONAL LAW—APPROPRIATION OF WATER. A state constitutional declaration that the water of natural streams in the state is the property of the state is valid and effectual as to all water, subject to prior appropriation. (Farm Inv. Co. v. Carpenter, 918.)

16. WATERS AND WATERCOURSES—APPROPRIATION.—Where the doctrine prevails that water may be acquired by prior appropriation, the water affected by such doctrine becomes publici juris, and a constitutional or statutory declaration that such water

is public property announces no new rule or principle. (Farm Inv. Co. v. Carpenter, 918.)

17. **WATERS AND WATERCOURSES.—CONSTITUTIONAL OR STATUTORY DECLARATIONS**, not interfering with existing vested rights, that the water of natural streams or other natural bodies of water in the state is public property, and subject to prior appropriation are valid and effective. (Farm Inv. Co. v. Carpenter, 918.)

18. **WATERS AND WATERCOURSES—STATE OWNERSHIP**. By constitutional or statutory declarations that the water in the natural streams or other natural bodies of water in the state is the "property of the public," or "property of the state," the state is vested with jurisdiction and control of it in its sovereign capacity. (Farm Inv. Co. v. Carpenter, 918.)

19. **WATERS AND WATERCOURSES—RIGHTS—ACQUIRED BY PRIOR APPROPRIATION**.—A prior appropriator of the water of a natural stream secures a property right therein, but he does not acquire title to the running water, except, it may be, to such quantity as shall, from time to time, have been lawfully diverted and after diversion may be running in his ditch or lateral. (Farm Inv. Co. v. Carpenter, 918.)

20. **WATERS AND WATERCOURSES—APPROPRIATION—POWER TO REGULATE**.—The state has power to regulate prior, as well as subsequent, rights of appropriation of water, and as all rights of appropriation partake of the same general characteristics, differing essentially only in priority and quantity, and possibly in purpose, it follows that if various rights are connected with the same stream, a subsequent claim cannot be successfully regulated without including in the regulations all rights both prior and subsequent. (Farm Inv. Co. v. Carpenter, 918.)

21. **WATERS AND WATERCOURSES—APPROPRIATION—STATE BOARD OF CONTROL**.—A statute conferring upon a state board of control the power to adjudicate the priorities of various claimants to the use of the public waters of the state is not void, as investing the board with judicial power, as it acts in an administrative capacity, and its determination is at most quasi judicial only. (Farm Inv. Co. v. Carpenter, 918.)

22. **WATERS AND WATERCOURSES—APPROPRIATION—STATE CONTROL—ADJUDICATIONS—DUTY OF CLAIMANTS**. A statute conferring upon a state board of control power to adjudicate the priorities of claimants to the use of public water may legally require all claimants, both prior and subsequent to the passage of the act, to submit their claims upon proper notice for determination by such board of control. (Farm Inv. Co. v. Carpenter, 918.)

23. **WATERS AND WATER RIGHTS—APPROPRIATION—STATE CONTROL—EFFECT OF ADJUDICATION**.—If a statute confers upon a state board of control power to adjudicate, after notice, the priorities of claimants to the use of public water, any matter actually and legally determined by final decree of such board, in the absence of fraud or collusion, becomes *res judicata*, at least as to the public and the parties participating in the proceedings. (Farm Inv. Co. v. Carpenter, 918.)

24. **WATERS AND WATER RIGHTS—APPROPRIATION—STATE CONTROL—EFFECT OF ADJUDICATION AGAINST CLAIMANT WITHOUT NOTICE OR APPEARANCE**.—Under a statute conferring upon a state board of control power to adjudicate,

after notice, the priorities of claimants to the public waters of the state, not imposing any penalty upon a claimant who fails to appear and submit proofs of his claim, an existing claimant is not concluded by a determination by such board in adjudication proceedings, if he has not appeared, and his right has not been considered. (*Farm Inv. Co. v. Carpenter*, 918.)

25. **WATERS AND WATER RIGHTS—APPROPRIATION—STATE CONTROL—EFFECT OF ADJUDICATION.**—If a statute conferring upon a state board of control power to adjudicate, after notice, the priorities of claimants to the public waters of the state, makes no provision expressly estopping a claimant failing to participate in adjudication proceedings, and as the decree is not res judicata as to his undetermined rights, he is at liberty to assert and maintain them in the courts, subject to the rule that in the absence of fraud or of facts sufficient to vitiate an adjudication, courts will not assume, in an independent action, to determine anew the rights of parties, which as between themselves have been settled by a decree of such board of control. (*Farm Inv. Co. v. Carpenter*, 918.)

26. **WATERS AND WATER RIGHTS—APPROPRIATION—STATE CONTROL—NOTICE TO CLAIMANTS BY MAIL.**—A statutory provision for notice by registered mail to known claimants as prior appropriators of water as to the time for the taking of testimony in adjudication proceedings as to the rights of such claimants, is valid, and not objectionable as not constituting notice by due process of law. (*Farm Inv. Co. v. Carpenter*, 918.)

27. **WATERS AND WATERCOURSES—APPROPRIATION.**—A right to the use of water may be acquired in Wyoming by priority of appropriation for beneficial purposes, in contravention of the common-law rule that every riparian proprietor is entitled to the continued natural flow of the water of the stream running through or adjacent to his lands. (*Farm Inv. Co. v. Carpenter*, 918.)

28. **WATERS AND WATERCOURSES.—APPROPRIATION OF WATER CONSISTS** of its diversion by some adequate means, and its application to a beneficial use. (*Farm Inv. Co. v. Carpenter*, 918.)

29. **WATERS—WRONGFUL DIVERSION—EVIDENCE.**—In an action for diverting waters from their natural course and onto the land of another, it is not error to permit a witness, acquainted with the location, to testify as to his observations of the course of the water a number of years before. (*Maxwell v. Shirts*, 268.)

30. **WATERS—WRONGFUL DIVERSION—EVIDENCE.**—In an action for diverting waters from their natural course and onto the land of another, the testimony as to the construction of a ditch some years previous near the stream is admissible as tending to show the condition of the lands around the watercourse. (*Maxwell v. Shirts*, 268.)

31. **WATERS—WRONGFUL DIVERSION BY TENANT.**—If it appears, in an action for diverting waters from their natural course, that the diversion is due to the acts of a tenant in possession, it is error to render judgment against the land owner. (*Maxwell v. Shirts*, 268.)

32. **PRESCRIPTION.—THE ERECTION AND MAINTENANCE OF A DAM** for more than forty years created a prescriptive right to continue its maintenance perpetually. (*Kray v. Muggli*, 332.)

33. **PRESCRIPTIVE RIGHT FINDS NO SUPPORT IN PECUNIARY CONSIDERATIONS.** Hence where one acquires a prescriptive right to have a dam maintained, it is immaterial that its re-

moval will result in less damage than its maintenance. (*Kray v. Muggli*, 332.)

34. **PRESCRIPTION—DAMS—RECIPROCAL RIGHTS OF RIPARIAN OWNERS.**—Where the flow of a stream has been diverted from its natural channel, or obstructed by a permanent dam, and this has continued for the time necessary to establish a prescriptive right, the riparian owners along such stream, who have improved their property with reference to the change and in reliance on the continuance thereof, acquire a reciprocal right to have the artificial conditions remain undisturbed. (*Kray v. Muggli*, 332.)

WILLS.

1. **WILLS—SIGNATURE AND ITS ACKNOWLEDGMENT.**—It is not necessary for a testator to place his name on the will in the presence of attesting witnesses. If he signs it without their presence, and afterward requests them to witness his signature, this is a sufficient acknowledgment. (*In re Clafin's Will*, 693.)

2. **WILLS—PUBLICATION.**—ANY COMMUNICATION of a testator's intent to give effect to a paper as his will, whether by word, sign, motions, or conduct, is sufficient to constitute a publication. (*In re Clafin's Will*, 693.)

3. **WILLS—PUBLICATION.**—THE WRITING AND SIGNING of a will, and the superintending of its execution, constitute a sufficient publication thereof by the testator. (*In re Clafin's Will*, 693.)

4. **WILLS—KNOWLEDGE OF WITNESSES.**—IT IS NOT NECESSARY to show, by the attesting witnesses, that at the time they signed they knew they were witnessing the testator's will. This fact, though necessary, may be otherwise shown. (*In re Clafin's Will*, 693.)

5. **WILLS—PRESENCE OF WITNESSES.**—If all the witnesses to a will are so situated that they may see one another sign, it is not material whether they do in fact or not. (*In re Clafin's Will*, 693.)

6. **WILLS—PROOF OF EXECUTION.**—THE CIRCUMSTANCES attending the execution of a will may be such as to control the evidence of the attesting witnesses. (*In re Clafin's Will*, 693.)

7. **WILLS—PROOF OF EXECUTION.**—WHEN THE ATTESTING witnesses are dead, beyond the reach of process, or unable to recollect the facts essential to a good execution, if their signatures and that of the testator are proved, an attestation clause showing a compliance with the formalities required by law is *prima facie* evidence of the due execution of the will. (*In re Clafin's Will*, 693.)

8. **WILLS—PRESUMPTION OF DUE EXECUTION.**—If the evidence tends to show that the testator was accustomed to draw and superintend the execution of wills for others, and that he drafted the will in question, with a perfect attestation clause, and superintended its execution with a knowledge of the requirements of law—this raises a strong presumption that such requirements were complied with. (*In re Clafin's Will*, 693.)

9. **WILLS—OLOGRAPHIC, ABBREVIATIONS.**—An olographic will, dated "New York, Nov. 22, /97," wholly written and signed by the testator, is properly and legally dated and valid. (*Estate of Lakemeyer*, 96.)

See Advancements.

WITNESSES.

1. WITNESSES—ATTESTATION—INTEREST.—If a statute, in order to secure evidence of some act, requires it to be done in the presence of, or attested by, a specified number of persons, an implication arises that these persons shall be such as are not directly interested in the act. A person having such interest is not a competent attesting witness. (*Ames v. Parrott*, 536.)

2. WITNESSES—IMPEACHING.—EVIDENCE OF THE CONVICTION FOR AN ASSAULT or of carrying concealed weapons is not admissible for the purpose of discrediting a witness. (*Smith v. State*, 47.)

3. EXPERT TESTIMONY.—IF A WITNESS EXHIBITS SUCH KNOWLEDGE, gained from experiments, observation, standard books, or other reliable source, as to make it appear that his opinion is of some value, he is entitled to testify, leaving to the court, in its discretion, to say when such knowledge is shown, and to the jury what the opinion is worth. (*Isenhour v. State*, 228.)

4. EXPERT WITNESS—QUALIFICATIONS OF.—A scientific witness may testify, though his knowledge is derived from reading and conversations, and not from experiments and personal demonstrations. (*Isenhour v. State*, 228.)

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